89-350

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

Lantana Cascade of Palm Beach, Ltd., a Florida limited partnership, by and through James A. Smith as one of its general partners

Petitioner,

v.

Lanca Homeowners, Inc., a Florida corporation not for profit,

Respondent.
_____/

Petition for a Writ of Certiorari
to the Supreme Court of Florida
Including Appendix Thereto

Edward A. Marod
Edward A. Marod, P.A.
Counsel for Petitioner
Post Office Box 3606
West Palm Beach, Florida 33402
(407) 832-0050

QUESTIONS PRESENTED FOR REVIEW

Question No. 1. Whether the minimum standards for due process of law are violated by a state court rule of civil procedure which permits class action suits on behalf of all tenants within individual mobile home parks, including tenants who make their permanent homes in other States, where such rule (a) does not require nor permit an evidentiary hearing to determine whether the class representative adequately represents the interests of the class purportedly represented, (b) does not require or permit notice to the class purportedly represented, and (c) does not provide or permit any opportunity for members of the purported class to "opt out?"

Question No. 2. Whether the due process rights of a party to a lawsuit are violated when, in the course of an appeal in that lawsuit, a new rule of civil procedure is promulgated "to take effect immediately," and where, as a result of the rule taking immediate effect, the party is deprived of a right to collect attorneys' fees and court costs for having prevailed in an action based upon the rules as they had previously existed?

THE PARTIES

Petitioner in this proceeding is **Lantana Cascade of Palm Beach, Ltd.**, (hereinafter "**Petitioner**") a Florida limited partnership whose general partners are James A. Smith, of Stuart, Florida, Edward Harris, of Miami, Florida, and Richard Wolfson, also of Miami. Petitioner is the owner of a mobile home park in Lantana, Florida, known as the Lantana Cascade Mobile Home Park (hereinafter "Park"). Petitioner appears in this proceeding, as below, through James A. Smith, one of the three general partners.

Respondent in this proceeding is **Lanca Homeowners, Inc,** (hereinafter "**Respondent**") a Florida corporation also known as Lanca Homeowners Association, Inc., which purports to be the official "mobile homeowners' association" for the Park pursuant to §723.075, Fla. Stat. (1987). As such, it purports to represent all of the persons (hereinafter "tenants") who rent lots at the Park and own the mobile homes located on those lots.

Other parties below, who are not proper parties to this proceeding, are: Patrick McKernan, who was the President of Respondent when the suit was filed, and who has been dismissed as a party; L. C. Grievance Committee, Inc., a Florida corporation which, when the suit was filed, also purported to represent all of the tenants, but which was not certified below to be a proper class representative; Richard Wolfson and Edward Harris, who were joined in the counterclaim below as general partners of Petitioner, but who have not personally participated in any appeals herein; Florida Mobile Home Owners' Association which appeared only as *amicus curiae* and which may seek to appear here as *amicus curiae*; and the Florida Manufactured Housing Association which appeared only as *amicus curiae* and which may seek to appear here as *amicus curiae*. In addition the Supreme Court of Florida, which promulgated the rule challenged here, may have an interest in this case notwithstanding that it was not technically a "party" below.

The Supreme Court of the United States

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REFERENCES TO REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The following published case decisions were delivered in the Courts below:

Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 541 So.2d 1121 (Fla. 1988) *reh. den.* (1989)

Lantana Cascade of Palm Beach, Ltd., v. Lanca Homeowners, Inc., 516 So.2d 1074 (Fla. 4th DCA 1987)

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT

This Court has the power to grant a writ of certiorari in this case pursuant to 28 U.S.C. §1257(a) both (1) because a court rule having the force of law in Florida was drawn in question as being violative of the Constitution and the decision of the highest court of Florida in which review could be had was in favor of the rule and, necessarily, against the Constitution, and (2) because Petitioner's right to be secure from deprivation of its property without due process of law was specially set up and the decision of the highest court of Florida in which review could be had was against the right and, necessarily, against the Constitution. By judgment dated September 22, 1988, the Supreme Court of Florida, in the course of deciding an interlocutory[1] appeal in this case, promulgated an unconstitutional[2] rule of civil procedure. In the text of that decision the court made that new rule applicable to this case. In doing

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[1]Although the decision in which the rule was promulgated was technically an interlocutory decision relative to the ultimate disposition on the merits of this case, the promulgation of the rule is "final." There is no other Court in Florida to which Petitioner can assert the promulgation of the rule to be unconstitutional, either facially or as applied.

[2]As in *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) the constitutional rights violated by the deficiencies in the rule are the rights of the absent class members whose rights are purportedly to be adjudicated in the class action. However, a defendant, like Petitioner which must face the risk of such a suit has standing to assert those rights because the defendant "would be obviously and immediately injured if [a] class-action judgment against it became final without binding the plaintiff class." *Phillips Petroleum Co., v. Shutts*, 472 U.S. at 805, 105 S.Ct. at 2971.

so, the Supreme Court of Florida reversed a ruling in favor of Petitioner which was correct under the law as it had existed both at the time this case was originally filed[3] and at the time of the entry of the judgment which was reversed. Petitioner challenged the constitutionality of the rule and the constitutionality of the deprivation of its rights in a timely motion for rehearing. The motion for rehearing was denied by order dated April 25, 1989.

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[3]That law was to be found in Fla. R. Civ. P. Rule 1.220, which is substantially identical to Fed. R. Civ. P. Rule 23, and contains all of the procedural safeguards which are missing from the rule challenged here. It must be noted, however, that under Florida law, a class action may not be maintained under Rule 1.220 by a class plaintiff which is not, itself, a member of the class which it purports to represent. *See, Lantana Cascade of Palm Beach, Ltd., v. Lanca Homeowners, Inc.*, 516 So.2d 1074, 1075 (Fla. 4th DCA 1987)

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Constitutional provisions involved in this case are the Fifth and Fourteenth Amendments to the Constitution of the United States. Pertinent excerpts thereof are reproduced in the Appendix.

The rule of civil procedure which is contended to violate provisions of the United States Constitution is Rule 1.222, Florida Rules of Civil Procedure, which provides:

> A mobile homeowners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest, including, but not limited to; the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action under this section, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action under this section. Nothing herein limits any statutory or common-law right of any individual homeowner or class of homeowners to bring an action which might otherwise be available. *An*

action under this rule shall not be subject to the requirements of rule 1.220. [Emphasis added]

Rule 1.220, Florida Rules of Civil Procedure, which Rule 1.222 states *shall not be applicable* in mobile homeowners' association class actions provides, in pertinent part:

> **(a) Prerequisites to Class Representation.** Before any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court shall first conclude that . . . (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.
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> * * *
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> **(c) Pleading Requirements.** Any pleading, counterclaim or crossclaim alleging the existence of a class shall contain the following:
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> (2) Under a separate heading, designated as "Class Representation Allegations," specific recitations of:
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> * * *
>
> (C) the particular facts and circumstance that show the claim or defense advanced by the representative party is typical of the

claim or defense of each member of the class;

(D)(i) the approximate number of class members, (ii) a definition of the alleged class, and (iii) the particular facts and circumstances that show the representative party will fairly and adequately protect and represent the interests of each member of the class; . . .

* * *

(d) Determination of Class Representation; Notice; Judgment; Claim or Defense Maintained Partly on behalf of Class.

(1) As soon as practicable after service of any pleading alleging the existence of a class under this rule and before service of an order for pretrial conference or a notice for trial, after hearing the court shall enter an order determining whether the claim or defense is maintainable on behalf of a class on the application of any party or on the court's initiative. Irrespective of whether the court determines that the claim or defense is maintainable on behalf of a class, the order shall separately state the findings of fact and conclusions of law upon which the determination is based. . . . If the court rules that the claim or defense shall be maintained on behalf of a class under subdivision

(b)(3), the order shall also provide for the notice required by subdivision (d)(2). If the court rules that the claim or defense shall be maintained on behalf of a class under subdivision (b)(1) or subdivision (b)(2), the order shall provide for the notice required by subdivision (d)(2), except that when a showing is made that the notice is not required, the court may provide for another kind of notice to the class as is appropriate.

(2) As soon as is practicable after the court determines that a claim is maintainable on behalf of a class, notice of the pendency of the claim or defense shall be given by the party asserting the existence of the class to all the members of the class. The notice shall be given to each member of the class who can be identified and located through reasonable effort and shall be given to the other members of the class in the manner determined by the court to be most practicable under the circumstances. Unless otherwise ordered by the court, the party asserting the existence of the class shall initially pay for the cost of giving notice. The notice shall inform each member of the class that (A) any member of the class who files a statement with the court by the date specified in the notice asking to be excluded shall be excluded from the class, (B) the judgment, whether favorable or not, will include all

> members who do not request to exclusion; and (C) any member who does not request exclusion may make a separate appearance within the time specified in the notice.

Other statutes which may be relevant to this case are §723.075(1) and §§723.076 - .079, Fla. Stat. (1987), which are reproduced in the Appendix. Other rules of Florida Procedure which may be relevant to this case are Rule 2.130, Florida Rules of Judicial Administration, and Rules 9.130(f) and 9.330, Florida Rules of Appellate Procedure which are also reproduced in the Appendix.

STATEMENT OF THE CASE

On September 22, 1988, the Supreme Court of Florida, in the text of an opinion issued in an interlocutory appeal in this case, promulgated a rule of civil procedure which permits certain corporations, known as mobile homeowners' associations, to bring class action lawsuits on behalf of the tenants of mobile home parks. *Lanca Homeowners, Inc., v. Lantana Cascade of Palm Beach, Ltd.*, 541 So.2d 1121 (Fla., 1988) *reh. den.* (1989). A mobile homeowners' association is similar in many ways to a condominium association, a property owners' association, a tenants association, and other forms of community associations. Statutes allowing suits by one form of community association or another now exist in forty (40) states and the District of Columbia.[4] Litigation concerning the propriety of class actions by such associations is not at all uncommon.[5]

The rule challenged here does not require that an evidentiary hearing be held to determine whether, in any particular suit, any such association can adequately protect and represent the interests of the tenants it purports to represent. *Id.* The rule does not require notice to members of the alleged classes of the pendency of the action. *Id.* The rule does not permit any absent class member to "opt

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[4]Hyatt, Wayne S., and Downer, Philip S., *Condominium and Homeowner Association Litigation: Community Association Law*, John Wiley & Sons, Inc., New York, New York (1987), Appendix 5-1, pp. 209-12. (hereinafter "Hyatt")

[5]*See*, Rohan, Patrick J., and Reskin, Melvin A., *Condominium Law & Practice: Forms*, Matthew Bender & Co., Inc., New York, New York (Rev. 1989 Edition), §17.11A, and cases there cited.

out" of the class action. *Id.* Rather, the rule specifically states that any action pursuant to its terms "shall not be subject to the requirements of" the rule of civil procedure governing other class actions in Florida.[6] *Id.* The requirements of the rule from which class actions by mobile homeowners' associations are exempted in Florida include the requirement of an evidentiary hearing to determine the adequacy of representation by the class plaintiff, the requirement of notice to absent class members, and the requirement of a provision in every class certification order permitting class members to "opt out." Fla. R. Civ. P. Rule 1.220(a), (c)-(d).

As explained, *infra*, in promulgating this rule in the text of an opinion in this case, the Supreme Court of Florida, without due process of law, deprived Petitioner of the benefits of a judgment to which it was entitled under the law as it had existed before the promulgation of the new rule.

Petitioner owns a mobile home park in Lantana, Florida, which contains 462 rental lots, upon which tenants may place mobile homes. [App. 36]. Respondent is a corporation which was formed, indirectly, by certain tenants of the Park. [*Id.*]. A substantial number of the tenants of the Park and officers and directors of the Respondent association are not in residence at the Park during the summer of each year. [App. 51]. Approximately sixty (60%) percent of the tenants of the Park are seasonal tenants [*i.e.*, tenants with permanent residences in States other than Florida]. [App. 49].

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[6]Fla. R. Civ. P. Rule 1.220

On March 24, 1986, more than two (2) years before the promulgation of the rule challenged here, Respondent and another corporation sent to Petitioner a letter, signed by their then president, Patrick McKernan, claiming that they represented all tenants in the Park and threatening a "rent strike" if their demands for changes in the Park and reductions in rent were not met. [App. 67 - 71].

On April 2, 1986, in reliance upon a firm belief that the Florida statute under which Respondent claimed authority to act as class representative for the tenants was unconstitutional under the Florida Constitution, Petitioner sued Respondent, the other corporation and Mr. McKernan in Florida state court, *inter alia*, for a declaratory judgment concerning the authority of Respondent to act as the representative of the tenants of the Park. [App. 62 - 71]. Respondent and the other corporation[7] counterclaimed for damages and other relief, purportedly as representatives of the class of all tenants of the Park. [App. 56 - 61]. The trial court scheduled an evidentiary hearing "to determine the rights of defendant / counterplaintiffs to represent a class." [App. 52, 54-55].

The hearing was held on December 23, 1986. At the hearing it was established that the claims asserted on behalf of the putative class were claims of tenants of the Park and that neither Respondent nor the other corporation were tenants of the Park. Moreover, evidence was admitted raising serious questions about Respondent's

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[7] Mr. McKernan did not join in the counterclaim as a counterplaintiff. [App. 56]

qualifications as a class representative for the described class. [App. 39 - 42] Under the then existing law in Florida, the fact that Respondent was not a member of the class which it purported to represent made it impossible for Respondent to act as class representative of that class.[8] Nonetheless, on January 5, 1987, the trial judge, in part in reliance upon the rule for "ordinary" class actions, and in part in reliance upon the provisions of §723.079(1), Fla. Stat. (1985) entered his "Order Certifying Class Action and Class Representative." [App. 12 - 15]. The order did not provide for notice to class members and did not permit putative class members to "opt out." [*Id.*]

The District Court of Appeal of Florida reversed the decision of the trial judge on the ground that Respondent was not a member of the class which it purported to represent as required by the existing law in Florida for all cases except cases involving condominium associations and cooperative housing associations. *Lantana Cascade of Palm Beach, Ltd., v. Lanca Homeowners, Inc.*, 516 So.2d 1074 (Fla. 4th DCA, 1987). Although the court acknowledged the existence of the statute relied upon by the trial judge, it held that, under the Florida Constitution, only the Supreme Court of Florida had the power to promulgate rules of procedure, and that, therefore, the trial court's reliance upon the cited statute was improper. [*Id.*] Immediately after the issuance of that opinion, Petitioner voluntarily dismissed the claims in its Complaint against Mr. McKernan. [App. 9, 36 - 37] Immediately after the issuance of mandate, Petitioner moved in the trial court to dismiss the

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[8]Fla. R. Civ. P. Rule 1.220(a)(2)-(3)

class action counterclaim for lack of standing. [App. 34 - 35] and to tax fees and costs against Respondent. [App. 31 - 33]

Respondent then appealed to the Supreme Court of Florida pursuant to that court's jurisdiction to review any decision of a District Court of Appeal which declares unconstitutional any Florida statute. While that appeal was pending, the trial judge was without power to enter a judgment finally disposing of the case,[9] therefore, it would have been futile for Petitioner to pursue vigorously its motion for dismissal of the counterclaim. Nonetheless, at that time, Petitioner contends it was the owner of the right to obtain both (1) a final judgment in its favor on Count I of its complaint for declaratory judgment declaring that Respondent did not have the authority, under the law as it existed when the suit was first filed, to represent the tenants of the Park, and (2) a judgment of dismissal of the counterclaims in the case brought by Respondent. Upon entry of such judgments Petitioner contends it was entitled to the recover its attorneys fees and costs from Respondent.[10]

The Florida Supreme Court held that the District Court of Appeal had properly ruled the statute unconstitutional under the Florida Constitution. *Lanca Homeowners, Inc., v. Lantana Cascade of Palm Beach, Ltd.*, 541 So.2d 1121 (Fla., 1988) *reh. den.* (1989). Having said that, the Supreme Court of Florida then promulgated a new rule of civil procedure which permits class actions by mobile homeowners' associations on behalf of

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[9]Fla. R. App. P. Rule 9.130(l)

[10]§723.068, Fla. Stat.(1985)

tenants of mobile home parks, declared the new rule to be effective immediately, and reversed the decision of the District Court of Appeal to the extent that it had determined that the counterclaim below could not be maintained as a class action with Respondent as class representative. *Id.*

On October 6, 1988, Petitioner timely moved for rehearing of the foregoing decision on several grounds, including the grounds that:

> In promulgating . . . Florida Rule of Civil Procedure 1.222, the Court overlooked or misapprehended the following:
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> * * *
>
> c. Due process of law requires at a minimum that an absent Plaintiff be provided with an opportunity to remove himself from a class action by executing and returning an "opt out" or "request for exclusion" form to the Court. *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965. 86 L.Ed.2d 628 (1985). In the alternative, the Court overlooked or misapprehended the fact that new Rule 1.222 of the Florida Rules of Civil Procedure fails to contain a provision to permit an absent Plaintiff to be provided with an opportunity to remove himself from a class action by executing and returning an "opt out" or "request for exclusion" for to the Court.
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> d. The due process clause of the United States Constitution requires that a named Plaintiff in a class action at all times

adequately represent the interests of the absent class members. *Phillips Petroleum Co. v. Shutts*, *supra*,; *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940)

e. Court rules ordinarily operate prospectively only and should not be made retrospective. 21 *Corpus Juris Secundum*, "Courts," § 176(c); *Bambrick v. Bambrick*, 165 So.2d 449 (Fla. 2d DCA 1964). Although this rule is subject to an exception for "a rule which relates only to procedure and in no way affects rights of the parties," in this case the change of the rule of procedure effects [sic] the substantive right of the PARK OWNER to the entry of a judgment in its favor in its action for a declaratory judgment that, at the time the suit below was filed, . . . Lanca . . . was [not] authorized to represent the tenants of the Lantana Cascade Mobile Home Park . . . and the award of costs and attorneys' fees, which, as a matter of law, would accompany such an adjudication. Thus the action of the Court in making a new rule applicable to this case and permitting Lanca to act as representative of the park tenants in this case denies the PARK OWNER a substantive right without due process of law.

[App. 24 - 30].

The rule did not exist before the court's decision of September 22, 1988. However, Respondent had, in the text of its brief to the Supreme Court of Florida requested as alternative relief the promulgation of a rule identical to the statute which had been declared unconstitutional. This request was challenged primarily on the ground that the Florida Rules of Judicial Administration provide for the promulgation of new or modified rules to become effective immediately only in emergencies,[11] while there had been no evidence of the existence of any such emergency either at the trial court level or at the Supreme Court of Florida.

At every stage of these proceedings Petitioner has asserted that Respondent could not be a proper class representative for the tenants of the Park because it could not comply with the requirements of the Florida equivalent of Fed. R. Civ. P. Rule 23. Both the District Court of Appeal and the Supreme Court of Florida agreed with this proposition, but the Supreme Court of Florida rendered its agreement a nullity by promulgating a new rule, applicable only to cases involving mobile homeowners' associations, containing none of the procedural protections held by this Court to be essential to protect the due process rights of absent class plaintiffs.

As a matter of law, no Florida trial judge or appellate panel including the Supreme Court of Florida will, in this case, ever consider or reconsider the issues raised here concerning the rule of civil procedure promulgated, coincidentally, within a

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[11] Fla. R. Jud. Admin 2.130(a)

decision in this case, because they have now been decided by the Supreme Court of Florida, and, hence, are "law of the case." The Supreme Court of Florida will not entertain any further motion for rehearing.[12]

[12]Fla. R. App. P. Rule 9.330(b)

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF FLORIDA DENYING PETITIONER'S CONSTITUTIONAL CHALLENGE TO RULE 1.222, FLORIDA RULES OF CIVIL PROCEDURE, DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A. Petitioner's Challenge to Rule 1.222 Florida Rules of Civil Procedure Directly Invoked Applicable Decisions of This Court

Rule 1.222, Florida Rules of Civil Procedure, challenged here, was promulgated in the text of an opinion of the Supreme Court of Florida deciding an interlocutory appeal in this case. *Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd.*, 541 So.2d 1121 (Fla. 1988) *reh. den.* (1989). The rule challenged here expressly permits class actions by mobile homeowners' associations without an evidentiary determination that the mobile homeowners' association at all times can and will adequately protect and represent the interests of the absent tenants of the Park, without requiring notice to absent class members of the pendency of the suit, and without a provision permitting absent class members to "opt out." Indeed, the rule specifically states that the provisions of a rule requiring such procedural steps is not applicable to class actions involving mobile homeowners' associations.

Petitioner submits that this rule, and, hence the decision in which it was promulgated, both directly conflict with the decisions of this Court in *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 105

S.Ct. 2965. 86 L.Ed.2d 628 (1985) and *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Those decisions expressly state that due process of law requires that every class action (1) involve an evidentiary determination that the class representative at all times can and will adequately protect and represent the interests of absent class member, (2) provide notice to all absent class members of the pendency of the suit, and (3) permit absent class members to "opt out." *See, Phillips Petroleum Co., v. Shutts*, 472 U.S. at 811-12, 105 S.Ct. at 2974. The rule challenged here is directly in conflict with the aforementioned decisions of this Court. Therefore, the decision of the Supreme Court of Florida denying Petitioner's challenge to the rule is a decision directly in conflict with this Court's decisions concerning the minimal standards of due process of law in class actions in state courts.

B. There Is No Ground Upon Which The Decision Below Could Be Based Other Than The Constitutional Ground

Although the order of the Supreme Court of Florida denying Petitioner's motion for rehearing was issued without opinion, it is clear from the circumstances of the case that it was based upon that court's view of the constitutional rights of litigants, and not upon any alternative, non-constitutional ground.

The only arguments in opposition to the motion for rehearing were (1) that the motion attempted to re-argue matters previously fully briefed and argued, and (2) that the rule, by its terms, "does insure that the association would adequately represent the interests of all class members." [App. 18-23] Assuming *arguendo* that the

former were the case, it would simply mean that the issues concerning the unconstitutionality of the rule were raised earlier than the motion for rehearing; thus, if the ground for denial of the motion for rehearing was attempted re-argument of the Federal question, the decision was still based on the Federal question. The latter argument is simply a denial of the argument that the rule is unconstitutional; therefore, a denial of the rehearing motion based upon the latter argument would, necessarily, be a decision directly contrary to this Court's rulings on the same Federal questions. In either case, no suggestion was made of any basis for deciding the issues in the motion for rehearing other than the constitutional one.

The motion for rehearing was timely filed. Fla. R. App. P. Rule 9.330. The issues raised in the motion for rehearing were raised at the very first opportunity at which they could be raised. *See, Hathorn v. Lovorn*, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). In order to deny the motion for rehearing it would have been necessary for the court to consider all of the grounds raised by petitioner. *See, e.g., In re Alkire's Estate*, 142 Fla. 862, 144 Fla. 606, 198 So. 475 (1940). Since some of the grounds raised in the motion for rehearing were constitutional grounds, the motion for rehearing could not have been denied without the constitutional issues being reached and decided in favor of the rule and against the Constitution.

Finally, as to this point, Petitioner submits that the circumstances of the case and the decision of the Supreme Court of Florida in an earlier decision involving a rule permitting class action suits by condominium associations as representatives of all of their members suggest that the reasoning of the

Supreme Court of Florida must have been that the statutes authorizing the creation and governing the operation of mobile homeowners' associations provided corporate procedural safeguards sufficient to justify the suspension of the rights of mobile home park tenants to judicial due process.[13] The facts of this case demonstrate the fallacy of that reasoning.

In this case the "mobile homeowners' association" was not formed by the tenants, it was formed by another corporation.[14] It had held no elections of officers or directors.[15] Those "officials" were appointed by an attorney.[16] It had no contractual bond with its purported members such as a fully executed subscription for membership, or subscription for stock.[17] Indeed, the documents it had from its "members" strongly suggested they had no desire to be bound by the association's actions until and unless it bought the Park from Petitioner.[18] These are not the characteristics of an institution qualified as a matter of law to represent in litigation hundreds of individuals.[19]

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[13] *The Florida Bar*, 353 So.2d 95, 97 (Fla. 1977)

[14] App. 40

[15] App. 41

[16] App. 46-47

[17] App. 41-42

[18] *Id.*

[19] *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 , 45 L.Ed.2d 343 (1975).

C. The Constitutional Issues Presented Are Issues of National Interest

The prevalence of residential communities governed by a condominium association, a cooperative association, a property owners association, a mobile home owners association, or some other form of community association is increasing. Litigation involving such associations is sufficiently common that books have been written about it.[20] The potential for judicial efficiency to be achieved through class actions by such entities is clear. Where previously hundred of substantially identical suits might have been necessary to determine claims of common interest to members of a particular association, the class action brought by the association permits one suit to serve.[21]

By virtue of the foregoing, every State has an interest in seeing a resolution of the constitutional parameters of such litigation. Under this Court's decision in *Phillips Petroleum Co. v. Shutts* all such suits must have an evidentiary determination that the association is, at all times, able to adequately protect and represent the interests of its alleged members, proper notice to absent class members and an opportunity for them to opt out. Under the decision challenged here, the foregoing requirements are supplanted by a blind presumption that certain types of statutory associations are adequate representatives of all persons deemed to be their members and that, for whatever reason, the

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[20]Hyatt, *supra.*

[21]Of course, class suits initiated by individual members of the classes involved would have the same result.

persons deemed by statute to be members of those associations. Under the rule, even this Court's conditions upon the bringing of class suits by organizations on behalf of their members are disregarded.[22] Rather, it is conclusively presumed that tenants of mobile home parks in Florida have no right to notice and no right to opt out of class actions brought by mobile homeowners' associations, even if they have not manifested any intention to become members and even if the association which purports to represent them has none of the characteristics previously listed by this Court as prerequisites to associational representation of individuals in litigation.[23]

Petitioner submits that the foregoing presumptions can never be warranted. Rather, in each case a factual inquiry is necessary to determine whether the association in question can and will adequately represent its members. It might well be

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[22]For instance, this Court has not yet sanctioned suits by associations on behalf of members except for injunctive, declaratory or other prospective relief, *Hunt, supra*, 432 U.S. at 343, *Warth, supra*, 422 U.S. at 515. In this case, of course, the primary thrust of the counterclaim is a suit for damages for allegedly unconscionable rental increases. In *Warth*, this Court suggested that an association could not bring such a suit on behalf of its members because the relief sought would "make the individual participation of each injured party necessary to a proper resolution of the case". 422 U.S. at 511. In this case the Supreme Court of Florida specifically found that the association could maintain a class action to recover damages for allegedly unconscionable rent increases, which, necessarily require individual participation of each injured party.

[23]*E.g.*, participation in the election of officers and financing the association, as in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 344-45, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), or voluntary membership, as in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 , 45 L.Ed.2d 343 (1975)..

the case that factual inquiry in many such cases would justify suit going forward with the association as plaintiff,[24] because the requirements for associational standing had been met through pro[illegible] state laws mandating membership, through proper proof of voluntary submission to "membership" by identifiable individuals, or by other evidence supporting the existence of true associational democracy and due process. However, the facts of this case clearly demonstrate that there can be cases in which those standards were not met and the requirements for judicial due process in class action suits must be met. Moreover, even where an association might properly be deemed to represent adequately its members, it is inconceivable that the constitutional requirements of notice to absent class members and the opportunity to "opt out" could ever be dispensed with.[25] Every community association in America would benefit from a decision in this case showing where the line properly must be drawn between constitutional associational standing and unconstitutional denial of judicial due process and when, if ever, the requirements of notice to absent class members and the opportunity to "opt out" might properly be eliminated in a class action suit brought by an association on behalf of its members.

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[24]As in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 , 45 L.Ed.2d 343 (1975)..

[25]*Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965. 86 L.Ed.2d 628 (1985)

II. THE JUDGMENT OF THE FLORIDA SUPREME COURT DENYING PETITIONER'S MOTION FOR REHEARING CONCERNING THE EFFECTIVE DATE OF RULE 1.222 DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON AN IMPORTANT FEDERAL QUESTION

A. The Supreme Court of Florida Deprived Petitioner of an Existing Right Without Due Process of Law

At the time of the decision in which the Supreme Court of Florida promulgated Rule 1.222, Fla. R. Civ. P., Petitioner held the right to obtain dismissal of the counterclaim filed and served by Respondent, and, the right subsumed therein to obtain an award of attorneys fees and costs from Respondent. *Lantana Cascade of Palm Beach, Ltd., v. Lanca Homeowners, Inc.*, 516 So.2d 1074 (Fla. 4th DCA 1987); Rule 1.220(a), Fla. R. Civ. P.; §723.068, Fla. Stat. (1987). Indeed, the Supreme Court of Florida itself confirmed the decision of the District Court of Appeal of Florida insofar as it construed the law as it had always theretofore existed. *Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd.*, 541 So.2d 1121 (Fla. 1988) *reh. den.* (1989). The decision of the Supreme Court of Florida did not then reinterpret existing rules to permit Respondent to prosecute the action below. Rather, the Supreme Court of Florida promulgated an entirely new rule pursuant to its exclusive rule-making authority under the Florida Constitution. *Id.; Avila South Condominium Association v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977).

In doing so, the Supreme Court of Florida changed the rules after Petitioner had already won the game, in violation of fundamental notions of fair play.

B. Decisions of This Court Prohibit Courts from Depriving Litigants of Existing Rights Without Due Process of Law

In this case, the principle reason for the filing of the suit in which the Respondent made its counterclaim was Petitioners belief that, under the law as it then existed, Respondent had no right to bring a class action on behalf of the tenants of the Park. [App. 26, 62-66]. The relief sought was a declaration of the rights of Respondent under the law as it then existed. *Id.* Both the District Court of Appeal of Florida and the Supreme Court of Florida agreed that, under the law as it existed at the time of the filing of the Complaint, Respondent had no right to bring a class action on behalf of the tenants of the Park. *Lantana Cascade of Palm Beach, Ltd., v. Lanca Homeowners, Inc.*, 516 So.2d 1074 (Fla. 4th DCA 1987); *Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd.*, 541 So.2d 1121 (Fla. 1988) *reh. den.* (1989). Therefore, Petitioner was entitled to both the entry of a declaratory judgment in its favor and to the dismissal of the counterclaim because Respondent lacked standing to bring such a suit at the time the suit was brought. This right carried with it the right to recover from Respondent the costs of the suit below and the attorneys fees incurred in defense of the improperly brought counterclaim.

In *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage Dist.*, 258

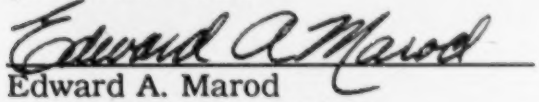
U.S. 338, 42 S.Ct. 525, 66 L.Ed. 647 (1922), for instance, this Court held the denial of such an existing right to the payment of money by means of retroactive legislation to be violative of the standards for due process of law as made applicable to the States by the Fourteenth Amendment. *See also*, Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 727 (1960) The new rule promulgated here will be given force of law in Florida and, hence, is functionally equivalent to "legislation," at least for purposes of Constitutional analysis. *See, e.g.,Williams v. Bruffy*, 96 U.S. 176, 183, 24 L.Ed. 716 (1877).

CONCLUSION

Petitioner prays this Honorable Court will issue its writ of certiorari in answer to this Petition. The question of the facial constitutionality of the rule promulgated by the Supreme Court of Florida cannot be challenged in any Florida court in further proceedings in this case. There can be no doubt that the rule is, on its face, not in compliance with this Court's decision in Phillips Petroleum Co. v. Shutts. There can likewise be no doubt that other States will, in the interest of expediency follow Florida's lead in promulgating similar rules if this rule is not stricken down. This Court has very recently held that expediency cannot justify the violation of Constitutional rights in the course of bankruptcy proceedings.[26] The same principle must apply to class action in State courts. Violation of this principle, in Florida, at least, can be prevented only if certiorari is granted here.

Respectfully submitted,

Edward A. Marod
Edward A. Marod, P.A.
Post Office Box 3606
West Palm Beach, Florida 33402
(407)832-0050



Edward A. Marod
Florida Bar No. 238961

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[26] *Granfinanciera, S.A., et al, Petitioners v. Paul C. Nordberg, Creditor Trustee for the Estate of Chase & Sanborn Corporation, et al,* United States Supreme Court Case No. 87-1716, 1989 U.S.LEXIS 3139, 57 U.S.L.W. 4898 (Opinion Filed June 23, 1989)

The Supreme Court of the United States

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition and the following Appendix have been served upon Michael Small, Esq., Small, Small & Small, Counsel for Respondents, Paramount Center - Penthouse, 139 North County Road, Palm Beach, Florida 33480 and upon Robert A. Butterworth, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32301 by United States mail, this 29th day of August, 1989.

EDWARD A. MAROD, P.A.
Counsel for Petitioner
Post Office Box 3606
West Palm Beach, Florida 33402
(407)832-0050

By: Edward A. Marod
Edward A. Marod, Esq.
Florida Bar No. 238961

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No._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

Lantana Cascade of Palm Beach, Ltd., a Florida limited partnership, by and through James A. Smith as one of its general partners

Petitioner,

v.

Lanca Homeowners, Inc., a Florida corporation not for profit,

Respondent.
_____/

Appendix to
Petition for a Writ of Certiorari
to the Supreme Court of Florida

Edward A. Marod
Edward A. Marod, P.A.
Counsel for Petitioner
Post Office Box 3606
West Palm Beach, Florida 33402
(407) 832-0050

The Supreme Court of the United States

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The Supreme Court of the United States

SUPREME COURT OF FLORIDA
NO. 71,767

LANCA HOMEOWNERS, INC., ETC., ET AL. Appellants, Cross-Appellees

vs.

LANTANA CASCADE OF PALM BEACH, LTD., ET AL. Appellees, Cross-Appellants.

_____ /

(September 22, 1988)

SHAW, J.

We have on appeal Lantana Cascade of Palm Beach, Ltd., v. Lanca Homeowners, Inc., 516 So.2d 1074 (Fla. 4th DCA 1987), which declares invalid section 723.079(1), Florida Statutes (1985). We have jurisdiction. Art. V, §3(b)(1), Fla. Const. We affirm in part and reverse in part the decision of the district court.

Lantana Cascade (Park Owner) owns Lantana Cascade Mobile Home Park (the park), which offers for rent 461 mobile home lots. L.C. Grievance Committee (L.C.) is a Florida not-for-profit corporation that was organized in 1975 to represent the interests of mobile home owners in the park. Lanca Homeowners (Lanca) is a Florida not-for-profit corporation that was organized in 1985 as "the homeowners association," pursuant to section 723.075, Florida Statutes (1985). Three-hundred and forty-four mobile home owners within the park consented in writing to joining Lanca. In 1986, Lanca and L.C. wrote a letter to Park Owner charging it with engaging in unfair practices and threatening to withhold future rental payments. Park Owner filed a claim seeking declaratory relief. Lanca and L.C., acting

as representatives of their membership, filed a class action counterclaim in which they alleged that:

> 1) Park Owner had violated the terms of a 1975 consent judgment which had required it to provide a certain level of maintenance and security within the common areas;
> 2) Park Owner had violated numerous administrative rules and statutory provisions;
> 3) Park Owner had imposed unconscionable rent increases.

After an evidentiary hearing, the trial court issued an order finding that Lanca, although not a member of the subject class, was an appropriate class representative under section 723.079(1), Florida Statutes (1985), which provides in part:

> The association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest, including, but not limited to: the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action.

The trial court also found that the counterclaim met the requirements of Florida Rule of Civil Procedure 1.220

and was thus maintainable as a class action. Park Owner appealed this order.

The district court reversed in part, affirmed in part. It held that although the counterclaim itself was suitable for presentation as a class action, Lanca lacked standing to assert it for two reasons. First, it held that section 723.079(1) is unconstitutional and cannot be used as a basis for finding Lanca a proper class representative. It based this finding on Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977), in which this Court ruled that the 1975 and 1976 versions of a similar statute governing condominium associations were an unconstitutional legislative incursion into this Court's exclusive rulemaking authority. In Avila, we recognized, however, that the statute had merit and we adopted a slightly modified version of the text of the 1976 statute as an emergency rule of procedure. Second, the district court found that because Lanca was not a member of the class, it failed to meet the requirements of Florida Rule of Civil Procedure 1.220(a), and thus lacked standing to represent the class under the rule.

Lanca appealed to this Court the finding that it was an improper class representative, and Park Owner cross-appealed the finding that the counterclaim was maintainable. Amicus curiae briefs in the present proceeding were submitted by the Federation of Mobile Home Owners of Florida, Inc., and by the Florida Manufactured Housing Association. Lanca raises three issues on appeal here: whether section 723.079(1) is constitutional; whether the statute should be adopted as a rule; and whether Lanca can act as class representative. On cross-appeal, Park Owner raises a single issue: whether the counterclaim itself is maintainable as a class action.

The statute is clearly unconstitutional. This Court in Avila, declared that section 718.111(2), Florida

Statutes (Supp. 1976), and 711.12(2), Florida Statutes (1975), constituted an unconstitutional intrusion on this Court's rulemaking authority. Both statutes concern the right of a condominium association to represent its members in a class action. In Avila, this Court reasoned that the sections sought to define the proper parties to suits litigating substantive rights; the sections were thus procedural and were within this Court's exclusive domain. See Art. V, §2(a), Fla. Const. The substance of the section found unconstitutional in Avila is practically identical to that of section 723.079(1), Florida Statutes (1985), which is in issue here. The relevant language of the instant section tracks the language of the 1976 section almost word for word. Only one word differs. The instant language says:

> The association may institute, maintain, settle, or appeal actions or hearings in its own name on behalf of all home owners concerning matters of common interest . . .
> .

§723.079(1), Fla. Stat. (1985) (emphasis added). And the 1976 statute says:

> [T]he association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest . . .
> .

§718.111(2), Fla. Stat. (Supp. 1976) (emphasis added). The Avila rationale applies equally here. Accordingly, we declare unconstitutional all parts of §723.079(1), Florida Statutes (1985) and (1987), except for the first two sentences of each.

As to whether this Court should adopt the substance of section 723.079(1) as an emergency rule of

procedure, we follow our reasoning in Avila. There, we recognized that:

> [T]he peculiar features of condominium development, ownership, and operation indicate the wisdom of providing a procedural vehicle for settlement of disputes affecting condominium unit owners concerning matters of common interest.

Avila, 347 S.2d at 608. Subsequent to the rule's adoption in Avila, this Court conducted proceedings to grant interested parties an opportunity to be heard on the matter. In re Rule 1.220(b), Florida Rules of Civil Procedure, 353 So.2d 95 (1977). Rejecting pleas for modification of the rule, this Court stated that:

> The response of this Court in Avila was to recognize the authority of the legislature to create capacity in condominium associations to maintain suits, but to reject the attempt of the legislature to design the procedural vehicle for vindication of substantive rights. However, recognizing the virtue of the policy sought to be asserted by the legislature, we adopted Rule 1.220(b).

Id. at 97. In the instant matter, we similarly note that the unique features of mobile home residency call for an effective procedural format for resolving disputes between park owners and residents concerning matters of shared interest. Again, we recognize the usefulness of the policy sought to be asserted by the legislature. Pursuant to Florida Rule of Judicial Administration 2.130(a), we adopt the following to be titled "Mobile Homeowners' Association," to be numbered Florida Rule

of Civil Procedure 1.222, and to be effective immediately:

> A mobile homeowners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest, including, but not limited to; the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action under this section, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action under this section. Nothing herein limits any statutory or common-law right of any individual homeowner or class of homeowners to bring an action which might otherwise be available. An action under this rule shall not be subject to the requirements of rule 1.220.

Thus, the answer to Lanca's third point on appeal--whether it can act as class representative is affirmative. Lanca, as the park's homeowners' association, has authority to represent all the park's home owners in a class action under the newly adopted rule.

As to the issue on cross-appeal, the district court correctly ruled that the counterclaim itself is maintainable as a class action. The first two counts of the counterclaim--violation of the consent judgment, and violation of statutes and rules--both meet the

requirements of rule 1.220(b); both clearly concern matters of common interest to the entire class. The third count presents the following issue: whether a claim of unconscionable rental increase in a mobile home park setting is suitable for allegation and proof in a class action. Some courts have indicated that unconscionability claims are too individualized for class action proceedings. See generally, Thomas v. Jones, 524 So.2d 693 (Fla. 5th DCA 1988); Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985), review denied, 492 So.2d 1333 (Fla. 1986); State v. DeAnza, 416 So.2d 1173 (Fla. 5th DCA), review denied, 424 So.2d 763 (Fla. 1982). Others have indicated that they are not. See generally Avila; Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d DCA 1982), review denied, 434 So.2d 889 (Fla. 1983); Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th DCA), review denied, 408 So.2d 1094 (Fla. 1981).

Section 723.033(2), Florida Statutes (1985), which provides a cause of action for unconscionable rental agreements states:

> When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its meaning and purpose, the relationship of the parties, and other relevant factors to aid the court in making the determination.

The key here is "the relationship of the parties." Where a rent increase by a park owner is a unilateral act, imposed across the board on all tenants and imposed after the initial rental agreement has been entered into, park residents have little choice but to accept the increase. They must accept it or, in many cases, sell their homes or undertake the considerable expense and burden of uprooting and moving. The "absence of a

meaningful choice" for these residents, who find the rent increased after their mobile homes have become affixed to the land, serves to meet the class action requirement of procedural unconscionability. See Thomas, 524 So.2d at 695 (Sharp, C. J. dissenting); Steinhardt; Kohl. As a rule, the relationship that exists between park owner and resident clearly outweighs any other factor in determining the effect of the increase on individual residents. This circumstance is shared equally by each member of the park. Thus, the alleged unconscionability of such an increase lends itself to proof in the class action format.*

Accordingly, we affirm those portions of the district court opinion that find section 723.079(1), Florida Statutes (1985), unconstitutional and that find the counterclaim maintainable. We reverse that portion of the opinion that finds Lanca an improper class representative. We remand for proceedings consistent with this opinion.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, BARKETT, GRIMES and KOGAN, JJ., Concur

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* To the extent that some of the class members may not occupy the same position, the court is always at liberty to designate subclasses. See Imperial Towers Condominium, Inc. v. Brown, 338 So.2d 1081 (Fla. 4th DCA 1976).

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT
JULY TERM 1987

LANTANA CASCADE OF PALM BEACH, LTD., and JAMES A. SMITH,

Appellants

v. CASE NO. 87-0315

LANCA HOMEOWNERS, INC., a/k/a LANCA HOMEOWNERS ASSOCIATION, INC., AND THE L.C. GRIEVANCE COMMITTEE, INC.., and PATRICK MCKERNAN,

Appellees

_____ /

Opinion filed December 16, 1987

Appeal of a non-final order from the Circuit Court for Palm Beach County; Daniel T.K. Hurley, Judge.

Edward A. Marod of Gunster, Yoakley, Criser & Stewart, P.A., West Palm Beach, for appellants.

Michael B. Small of Small, Clark & Berris, Palm Beach, for appellees.

Jack M. Skelding, Jr., and David D. Eastman of Parker, Skelding, McVoy & Labasky, Tallahassee, for Amicus Curiae-

Florida Manufactured Housing Association, Inc.

Lee Jay Colling and Douglas B. Beattie of Colling & Beattie, Orlando, for Amicus Curiae-The Federation of Mobile Home Owners of Florida, Inc.

PER CURIAM.

This is an appeal of a non=final order certifying an action as maintainable as a class action. We have jurisdiction to hear this appeal pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(i). See Maner Properties, Inc. v. Siksay, 489 So.2d 842 (Fla. 4th DCA 1986). We reverse.

Lantana Cascade of Palm Beach, Ltd. and James A. Smith, appellants, filed an action for declaratory judgment against Lanca Homeowners, Inc. (Lanca), L.C. Grievance Committee (L.C. Grievance), and Patrick McKernan, appellees. Lanca and L.C. Grievance, as alleged representatives of the mobile home residents of Lantana Park, filed a counterclaim for injunctive relief and damages.

After an evidentiary hearing, the trial court found that, although Lanca is not a member of the subject class, it was an appropriate class representative based on the authority of section 723.079(1), Florida Statutes (1985). Moreover, the trial court held that the counterclaim, except for specified portions, met the prerequisites of Florida Rule of Civil Procedure 1.220, and thus, could be maintained as a class action.

Appellants raise the issues of whether Lanca can be an appropriate class representative and whether the counterclaim can be brought as a class action. By order of this court, both The Federation of Mobile Home Owners of Florida, Inc. and Florida Manufactured

Housing Association, Inc. filed a brief as an amicus curiae addressing the first issue.

We find that the trial court erred when it found that Lanca was an appropriate class representative for the mobile home residents. Lanca is not a member of the class, and therefore, does not meet the requirements of Florida Rule of Civil Procedure 1.220(a). Moreover, section 723.079(1), Florida Statutes (1985) cannot be used as authority to find that Lanca is a proper class representative. The language used in section 723.079(1) which purports to give Lanca the authority to act as a class representative has been struck down as unconstitutional in that it usurps the Florida Supreme Court's rulemaking authority. Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1976). Therefore, on the authority of Avila, we hold section 723.079(1), Florida Statutes (1985), except for the first two sentences, unconstitutional. Accordingly, we reverse the portion of the final judgment which finds Lanca as an appropriate class representative.

However, we affirm the trial court's finding that the counterclaim meet the requisites of Florida Rule of Civil Procedure 1.220(b).

Accordingly, we reverse in part and affirm in part.

GLICKSTEIN, WALDEN and STONE, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

LANTANA CASCADE OF PALM BEACH, LTD.et al.

Plaintiffs/
Counterdefendants,

vs. CASE NO. 86-3107 (CL) F

LANCA HOMEOWNERS, INC., et al.

Defendants/
Counterplaintiffs.

_____/

ORDER CERTIFYING CLASS ACTION
AND CLASS REPRESENTATIVE

THIS CAUSE came on for hearing pursuant to Rule 1.220(d), Fla.R.Civ.P., to determine whether the counterclaim may be maintained as a class action and, if so, whether one or both of the counterclaimants qualify to serve as the class representative. In accord with the dictates of Rule 1.220(d)(1), Fla.R.Civ.P., the court makes the following

FINDINGS OF FACT

1. This case involves a controversy between the owners and the residents of a mobile home park.

2. L.C. Grievance Committee (L.C. Grievance) is a Florida not-for-profit corporation which was formed in 1975 to represent the residents in their dealings

with the park owners. Because of its representative capacity, it was allowed to intervene in earlier litigation and, thereby, became a party to a consent judgment which obligated the park owners to take certain steps to maintain the common areas and common facilities of the park. See O'Toole v. Churchill Group et al., Case No. 75-1257 CA (L) 01 D (Fla. 15th Jud.Cir.).

3. Lanca Homeowners, Inc. (Lanca) is a Florida not-for-profit corporation which was formed in 1985 pursuant to section 723.075, Florida Statutes (1985).

4. Four hundred and sixty-one (461) mobile home owners reside in the park; three hundred and forty-four (344) of these owners have consented in writing to become members of Lanca.

5. Counterclaimants have filed a three-count counterclaim which they now seek to prosecute as a class action. Count I alleges violation of the earlier consent decree with respect to maintenance of the common facilities and common areas of the park. Count II alleges a host of statutory violations and particularizes these allegations by incorporating, as an exhibit, a letter dated March 24, 1986. Among the allegations contained in the letter exhibit are failure to make required disclosure and giving false information. Count III alleges unconscionable rent as a result of procedural unconscionability.

Based upon the foregoing, the court reaches the following

CONCLUSIONS OF LAW

1. With a partial exception, which will be discussed below, the counterclaim meets all of the prerequisites set forth in Rule 1.220(a), Fla.R. Civ.P.

2. Furthermore, the court concludes that the criteria set forth in Rule 1.220(b)(A) and (B) are present in the case at bar.

3. Conclusion #1 essentially rejects the counterdefendants' contention that the claims are too individualized to permit resolution by class action. By and large, all of the claims focus on problems with the common areas and common facilities. There is, however, one notable exception. Count II incorporates a letter of March 24, 1986, which lists twenty-six alleged statutory violations. To the extent that some of these involve allegations of fraud of misrepresentation, they may not be the subject of a class action. See Lance v. Wade, 457 So.2d 1008 (Fla. 1984); Maner Properties, Inc. v. Siksay, 489 So.2d 842 (Fla. 4th DCA 1986). Accordingly, the allegations set forth in paragraphs 1,2,3, and 12(a)(b)(d)(e)(g)(j)(k), may not be prosecuted by way of class action. By the same token, the allegations in paragraph 8 of the letter may be the subject of a class action only if they refer to common utility connections, etc.

4. Lanca is an appropriate class representative. This conclusion constitutes a rejection of the counterdefendants assertion that Lanca is incapable of serving as a class representative because it is not a member of the subject class. See generally Stabinski v. Pirelli Tire Corp., 371 So.2d 679 (Fla. 3d DCA 1979). This position, however, overlooks the substantive grant of authority contained in section 723.079(1), Florida Statutes (1985), which states that "(i)f the association has the authority to maintain a class action, the association may be joined in an action as a representative of that class...." Counterdefendants suggest that this grant of authority is ineffective in light of the court's holding in Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1976). I disagree. Avila struck down section 711.12(2), Florida

Statutes (1975) ("When the board of administration is not controlled by the developer, the association shall have the authority and the power to maintain a class action....") because it usurped the court's rulemaking authority. On the other hand, section 723.079(1), expressly defers to the court's rulemaking power by empowering the association to act as a class representative only if it has the authority to maintain a class action, i.e., if it satisfies the requirements of Rule 1.220, Fla.R.Civ.P.

Accordingly, it is

ORDERED AND ADJUDGED that, to the extent permitted by this order, the counterclaim in the case at bar may be maintained as a class action and it is further

ORDERED AND ADJUDGED that Lanca Homeowners, Inc. shall serve as the class representative.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 3rd day of January, 1987.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
Circuit Judge

Copies furnished counsel

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the District Court of Appeal, Fourth District.

WHEREAS, in that certain case filed in this Court Styled:

LANCA HOMEOWNERS, INC., etc., et al
v.
LANTANA CASCADE OF PALM BEACH, LTD., et al

Case No. 71,767
Your Case No. 87-0315

The attached opinion was rendered on September 22, 1988.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Raymond Ehrlich
Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital,
On this 25th day of April 1989.
(Seal)

The Supreme Court of the United States

SUPREME COURT OF FLORIDA
TUESDAY APRIL 25, 1989
Case No. 71,767
District Court of Appeal, 4th District
No. 87-0315

LANCA HOMEOWNERS, INC., ETC.,
ET AL. Appellants, Cross-Appellees

vs.

LANTANA CASCADE OF PALM BEACH, LTD.,
ET AL. Appellees, Cross-Appellants.
_____ /

Upon consideration of the Motion for Rehearing or Clarification filed in the above cause by attorney for appellees/cross-appellants, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that Appellees/Cross-Appellants' Request for Oral Argument is Denied, and it is further

ORDERED that Appellants'/Cross-Appellees Motion for Attorneys' Fees is granted; the amount to be determined by the trial court (see Fla. R. App. P. 9.400(b), 351 So.2d 981), and it is further

ORDERED THAT Appellees/Cross-Appellants' Motion for Attorneys' Fees is hereby denied.

(Seal)

IN THE SUPREME COURT
STATE OF FLORIDA

LANCA HOMEOWNERS, INC., a/k/a
LANCA HOMEOWNERS ASSOCIATION, INC.
et al.,

Appellants/Cross-Appellees

vs. CASE NO: 71,767
4TH DCA: 87-0315

LANTANA CASCADE OF PALM BEACH, LTD.,
and JAMES A. SMITH,

Appellees/Cross-Appellants.
_____ /

REPLY TO PARK OWNER'S MOTION FOR REHEARING OR CLARIFICATION

COME NOW the above-named appellants/cross-appellees (Mobile Home Owners/Tenants) by and through their undersigned counsel, and reply to the Park Owner's Motion for Rehearing or Clarification served under a certificate dated October 6, 1988, of this court's Opinion of September 22, 1988, as follows:

1. The Park Owner's Motion for Rehearing or Clarification represents an attempt to re-argue the merits of he Court's Opinion entered on September 22, 1988, and should be summarily denied. See FRAP 9.330(a); Texas Company v. Davidson, 76 So2d 558 (FL-1919). This Court, in Department of Revenue v. Leadership Housing, Inc., 322 So2d 7 (FL-1975), emphatically stated that the legal arguments on the

issues brought before the court must be made between the parties before a judicial decision is rendered; not between one litigant and a tribunal which has already ruled. Id. at 9.

In Parker v. Baker, 499 So2d 843 (FLAPP-2nd DCA-1986), the Second District Court of Appeal reaffirmed the intent and policy of Rule 9.330(a), FRAP, in finding that the petitioner had flagrantly violated the motion for rehearing rule, when every point mentioned in the motion for rehearing was either argued in the brief and/or oral argument, and was addressed by the panel opinion. There is no question, from a reading of the briefs in the instant case involving the Lantana Mobile Home Park before this honorable Supreme Court, and in reviewing the extensive oral argument presented before this Supreme Court, and in reading the lengthy and detailed Opinion of this court, that the petitioner (Park Owner) has likewise fragrantly violated the motion for rehearing rule. As such, the Motion for Rehearing should be dismissed in accordance with the provisions of Rule 9.330(a), FRAP, and in accordance with Department of Revenue v. Leadership Housing, Inc., 322 So2d 7 (FL-1975).

This Supreme Court held in Department of Revenue v. Leadership Housing, Inc., Ibid, that:

> "An application for rehearing that is practically a joinder of issue with the court as to the correctness of its conclusions upon points involved in its decision that were expressly considered and passed upon, and the reargues the cause in advance of a permit from the court for such re-argument, is a flagrant violation of the rule, and such an application will not be considered. The petitioner for rehearing infracts the rule in all of the above-particulars, and the profession is hereby

> put on noticed that in the future the court will adhere strictly to the requirements of the rule in such cases, and will visit infractions thereof by a refusal to consider such applications and with a dismissal thereof."(emphasis added)

While this response is not couched in the form of a motion to impose sanctions, nevertheless, appellants/cross appellees respectfully submit to this court that once again, the Leadership court's admonition has been violated and disregarded. Appellee/cross appellants (Park Owner) are doing nothing more than trying to "take another bite of the apple" by filing the Petition for Rehearing, which addresses every single concern and argument, already presented.

2. The Park Owner's arguments concerning the promulgation of FRCP 1.222, are without basis in law or fact and as set forth above, represent a re-statement of the same arguments that already have been made to the Court and rejected by it.

a The Park Owner's contention that the record on appeal contains no evidence of an "emergency" which would justify the promulgation of FRCP 1.222 is untrue. The very facts which led to this lawsuit, namely the alleged unconscionable rental increase by the Park Owner, and the unique relationship that exists between the Park Owner and the Mobile Home Owners provide the "emergency" to justify the court's action. The grossly inferior bargaining position of THe [sic] Mobile Home Owners and the unique features of mobile home residency required immediate action to establish and provide an effective procedural format for resolving disputes between park owners and residents concerning matters of shared interest. In addition, the court's experience in adopting FRCP 1.221 in Avila South Condominium Association v. Kappa Corp., 347 So2d 599 (FL-1977) and the similar circumstances

that existed with the adoption of that rule of procedure provide authority for the action taken in the case sub judice.

b. FRCP 1.222, as adopted, does insure that the association would adequately represent the interests of all class members since an action can be maintained only concerning matters of "common interest," etc. as a matter of policy, the court has recognized the unique features of mobile home living and the need for an immediate, effective procedural format to resolve disputes concerning such matters of shared interest. This unique relationship of the parties and the fact that the circumstances attendant to a unilateral rental increase imposed by a park owner across the board on all tenants apply equally to all mobile home owners in the park insures adequate representation of all class members as a matter of law.

c. The argument raised by the Park Owner that the adopted rule of procedure denies it a substantive right without due process is entirely unsupported and inapplicable to the proceedings presently before the court. It is well-settled that the decision of the appellate court of ultimate resort becomes the "law of the case" and governs the case in the trial court through all subsequent stages of the proceeding. See generally 3 FL Jur 2d, Appellate Review, Section 414 et seq. In addition, the Park Owner's argument on this point is premature and should be made to the trial court if and when applicable

d. The Park Owner's arguments regarding the differences between condominium owners and mobile home owners, and their respective associations, were exhaustively argued by the Park Owner to the Court prior to its decision and is impermissible re-argument of the merits of case and should be disregarded.

3. The Park Owner's argument that the requirements for procedural unconscionability in mobile home cases are too personal and individualized to be asserted in a class action was fully briefed to the court, discussed in oral argument and rejected by this court. In its Opinion entered on September 22, 1988, the court has recognized the grossly disparate bargaining positions of the Park Owner and the Mobile Home Owners and the latter's "lack of meaningful choice" when faced with a unilateral rental increase by the park owner and held that "the alleged unconscionability of such an increase lends itself to proof in the class action format." In fact, in Williams v. Walker-Thomas Furniture Co., 350 F2d 445 (DC App-1965), which is cited by the Park Owner in its Motion for Rehearing or Clarification, the United States Court of Appeals recognized that in testing for contractual unconscionability the meaningfulness of the choice is negated by a gross inequality of bargaining power. Id. at 449.

4. The Park Owner's request that a decision in this case be held in abeyance until the Jones v. Thomas certiorari proceedings (Case No. 72,563) are completed should be summarily denied by the court. The court has decided the case sub judice and the only issue before it now is a rehearing or clarification of same. The Park Owner's request is legally insufficient and improper in this proceeding. In addition, the court is well aware of the factual and legal issues presented in Jones v. Thomas, supra, since the Park Owner brought the case to the Court's attention by filing a Notice of Supplemental Authority under a certificate dated April 21, 1988. It cited the case in its arguments on the merits and the court cited the Jones v. Thomas case in its Opinion in the case sub judice.

5. Contrary to the Park Owner's contention in its Motion for Rehearing or Clarification, the Opinion entered on September 22, 1988, in the footnote on

page 6, clearly recognizes and addresses the issue of "subclasses."

WHEREFORE, appellants/cross-appellees (Mobile Home Owners/Tenants) pray that this court deny the Park Owner's Motion for Rehearing or Clarification for the reasons set forth above.

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. mail to : LEE JAY COLLING, ESQ., Suite 500, NCNB National Bank Building, 250 North Orange Avenue, Orlando, FL 32801; EDWARD MAROD, ESQ., P.O. Box 4587, West Palm Beach, FL 33402; JACK M. SKELDING, JR., ESQ., and DAVID D. EASTMAN, ESQ., P.O. Box 669, Tallahassee, FL 32302, this 3rd day of November, 1988.

Respectfully,

SMALL, SMALL & SMALL, P.A.

By /s/ MICHAEL B. SMALL
MICHAEL B. SMALL, ESQ.
Attorneys for Appellants/
Cross-Appellees
Florida Bar No: 074872
Paramount Center - Penthouse
139 North County Road
Palm Beach, FL 33480
(407) 833-1100
Telecopier: 407/835-0547

SUPREME COURT OF FLORIDA

LANCA HOMEOWNERS, INC.
ETC., ET AL.

Appellants,

Cross-Appellee

vs. CASE NO. 71,767

LANTANA CASCADE OF PALM BEACH
LTD., ET AL.

Appellee

Cross-Appellants.
_____ /

PARK OWNER'S MOTION FOR REHEARING OR CLARIFICATION

Appellee/Cross-Appellant, LANTANA CASCADE OF PALM BEACH, LTD., (hereinafter, "PARK OWNER") by its undersigned attorneys and pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure moves this Court for rehearing or for clarification of the decision rendered in this case on September 22, 1988. The points of law and fact which the PARK OWNER submits the Court has overlooked or misapprehended are as follows:

I. In promulgating a new rule of civil procedure to be titled "Mobile Homeowners' Association" and to be numbered Florida Rule of Civil Procedure 1.222, the Court overlooked or misapprehended the following:

a The record on appeal contained no evidence upon which it could be concluded that an

"emergency" existed which would justify the invocation of Florida Rule of Judicial Administration 2.130(a). In the alternative, the Court overlooked or misapprehended the fact that Florida Rule of Judicial Administration 2.130(a) is to be applied only "if an emergency exists that does not permit reference to the appropriate committee of the Florida Bar for recommendations."

b. Rule of Judicial Administration 2.130(a) requires that the Court fix a date for further consideration of the change if the change is made without reference to the appropriate committee of the Florida Bar for recommendations. In the alternative, the Court overlooked or misapprehended the fact that it failed to refer the matter to the appropriate committee of the Florida Bar for recommendations.

c. Due process of law requires at a minimum that an absent Plaintiff be provided with an opportunity to remove himself from a class action by executing and returning an "opt out" or "request for exclusion" form to the Court. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed. 628 (1985). In the alternative, the Court overlooked or misapprehended the fact that new Rule 1.222 of the Florida Rules of Civil Procedure fails to contain a provision to permit an absent Plaintiff to be provided with an opportunity to remove himself from the class be executing and returning an "opt out" or "request for exclusion" form to the Court.

d. The due process clause of the United States Constitution requires that the named Plaintiff in a class action at all times adequately represent the interests of the absent class members. Phillips Petroleum Co. v. Shutts, supra; Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). In the alternative, the Court overlooked or misapprehended the fact that new Rule 1.222 of the Florida Rules of Civil

Procedure does not contain provisions insuring that the named Plaintiff in class actions pursuant to its terms adequately represents the interests of the absent class members, at all times.

e. Court rules ordinarily operate prospectively only and should not be made retrospective. 21 Corpus Juris Secundum, "Courts", Section 176(c); Bambrick v. Bambrick, 165 So. 2d 449 (Fla. 2d 449 (Fla. 2d D.C.A. 1964). Although this rule is subject to an exception for "a rule which relates only to procedure and in no way affects rights of the parties", in this case the change of the rule of procedure effects the substantive right of the PARK OWNER to the entry of a judgment in its favor in its action for a declaratory judgment that, at the time the suit below was filed, neither Lanca Homeowners Association, Inc. (hereinafter "Lanca") nor L.C. Grievance Committee, Inc. was authorized to represent the tenants of the Lantana Cascade Mobile Home Park (hereinafter "the Park") and the award of costs and attorney's fees, which, as a matter of law, would accompany such an adjudication. Thus, the action of the Court in making a new rule applicable to this case and permitting Lanca to act as representative of the park tenants in this case denies the PARK OWNER a substantive right without due process of law.

f. Unlike condominium associations which are mandated by Chapters 718 and 719, Florida Statutes, mobile homeowners associations are voluntary. This difference is substantial when considered in terms of the effect upon the adequacy of representation which such an association might provide for those whom it purports to represent. Moreover, when a condominium owner acquires a condominium, the condominium owner knows that there will be a condominium association to which he must cede some of his individual rights for the privilege of living in a condominium. A mobile homeowner is not and the

mobile homeowners within the Park were not aware of the existence of a mobile homeowners association nor the potential of the existence of a mobile homeowners association and, hence, could not properly be deemed to have voluntarily ceded their rights to such association simply by becoming a tenant of the park.

g. There is a substantial difference between the owner of a condominium or cooperative housing unit and a tenant in an apartment house. There is likewise a substantial difference between the owner of a condominium or cooperative mobile home park lot and the renter of a rental mobile home park lot. The new rule fails to address these differences. Indeed, by its inclusion of substantive right in favor of all mobile home park associations to prosecute class actions with respect to ad valorem taxes, which in a rental park situation such as is involved in this case, are the sole responsibility of the park owner, the rule likely will inspire substantial mischief.

II. In ruling upon the maintainability of the class action counter- claim in this case, insofar as it alleges "unconscionable rent increases", the Court overlooked or misapprehended the following:

a The fact that the manifest weight of the evidence and the record in this case shows that the relationships of the parties differed substantially from tenant to tenant, including differences as to their education, their sophistication, their ability to appreciate the terms of their leases at the time they entered their leases (if any), the conditions enjoyed by them with respect to their particular mobile home park lots, whether or not they had ever signed a written lease, whether or not they had moved in before or after the enactment of the statute relating to unconscionable provisions in mobile home park lease agreements, whether or not they had waived their rights (if any) to complain about the rents by their actions subsequent to

the period encompassing the Statute of Limitations, and other factors so numerous as to make it impossible to account for all such differences by the establishment of "sub-classes".

b. Rule 1.222 of the Florida Rules of Civil Procedure does not provide for "sub-classes" to deal with differences of the sort described supra at II.a Rather, it expressly states that the requirements of Rule 1.220 are not applicable. Since Rule 1.220 requires the creation of sub-classes where appropriate, the new rule technically does not permit sub-classes.

c. Rule 1.222 does not specifically permit class suits alleging unconscionable rent increases. Although it permits class suits involving matters of "common interest" unconscionable lease terms cannot, as a matter of law, be matters of common interest unless all tenants had the same education, experience and sophistication and signed identical leases simultaneously when they first entered the Park.

d. The Court has recently accepted jurisdiction by certiorari to review the decision in the case of Thomas v. Jones, 524 So. 2d 693 (Fla. 5th D.C.A. 1988) which presents squarely the question of whether or not a class action for unconscionable rent at a mobile home park may properly be prosecuted. The Thomas vs. Jones record is complete on this issue because it is an appeal from a final judgment. Therefore, the holding in this case should be held in obeyance [sic] until the Thomas v. Jones certiorari proceedings are completed.

e. The law of procedural unconscionability requires an analysis of the respective bargaining powers of the contracting parties and the ability of the particular contracting party, in light of his education, intelligence, or lack thereof, to understand the terms of the contract at the time the contract was entered into. Bennett v. Behring Corp., 466 F.Supp.

689 (S.D. Fla. 1979); Williams v. Walker Thomas Furniture Co., 121 U.S. App. D.C. 315, 350 F.2d 445 (1965); International Realty Associates v. McAdoo, 87 Fla. 1, 99 So. 117 (1924); Mobile America Corporation v. Howard, 307 So.2d 507 (Fla. 1st D.C.A. 1975). A contract fair when entered into does not thereafter become unconscionable. Bennett v. Behring, supra at 698. In this case, the separate "contracts" of tenancy were entered into at different times. The event of raising rent pursuant to a contract for tenancy or pursuant to the common law for a holdover tenant does not and cannot constitute a separate contract for purposes of unconscionability analysis. Indeed, Section 723.033, Florida Statutes (1985), which was cited by the Court in the course of its analysis, provides in its first section "if the Court, as a matter of law, finds a mobile home lot rental agreement, or any provision of the rental agreement, to have been unconscionable at the time it was made, the Court may. . . "[emphasis added]. Therefore, even the statute relied upon by this Court indicates that the only time which may properly be considered in a determination of unconscionability of a rental agreement is the time at which the rental agreement was made. As to that point in time there can be no doubt that the situation of the members of the putative class differ so dramatically as to prohibit class prosecution.

Park Owner submits that had the Court not overlooked or misapprehended the foregoing matters it either would not have promulgated any new rule or would have promulgated a substantially different rule and would not have ruled the counterclaim to be maintainable as a class action insofar as it relates to a claim of unconscionability.

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. Mail to Michael B. Small, Esq., Paramount Center, 139 North County Road, Palm Beach, Florida 33480; Douglas

B. Beattie, Esq., 250 North Orange Avenue, Suite 500, Orlando, Florida 32801 and David D. Eastman, Esq., Post Office Box 669, Tallahassee, Florida 32302 this 6th day of October, 1988.

Gunster, Yoakley, Criser & Stewart, P.A.
777 S. Flagler Drive, Suite 500
P.O. Box 4587
West Palm Beach, FL 33402-4587
(407) 650-0545
Attorneys for
Appellee/Cross Appellant

By: /s/ EDWARD A. MAROD
Edward A. Marod
Florida Bar No. 238961

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 86-3107 (CL) F

LANTANA CASCADE OF PALM
BEACH, LTD.,a Florida limited
partnership, and JAMES A. SMITH,
as general partner,

Plaintiffs/
Counterdefendants,

vs.

LANCA HOMEOWNERS, INC., a/k/a
LANCA HOMEOWNERS
ASSOCIATION, INC., AND THE L. C.
GRIEVANCE COMMITTEE, INC.,

Defendants/
Counterclaimants.

_____/

MOTION TO TAX ATTORNEYS FEES AND COSTS

Plaintiffs, Lantana Cascade of Palm Beach, Ltd. and James A. Smith and counterdefendants, Lantana Cascade of Palm Beach, Ltd., Edward F. Harris, James A. Smith, and Richard S. Wolfson by their undersigned attorneys pray the court pursuant to Section 723.068 Fla.Stat. to award them their reasonable attorneys fees in this case and say:

1. Section 723.068 Fla.Stat. provides:

> Except as provided in s. 723.037, in any proceeding between private parties to enforce provisions of this chapter, the prevailing party is entitled to a reasonable attorney's fee.

2. Section 723.037 Fla.Stat. provides, inter alia

> If a party refuses to agree to mediate or arbitrate, or fails to request mediation, upon proper request, that party shall not be entitled to attorneys fees in any action relating to a dispute described in this section.

3. In this case, plaintiffs/counterdefen-dants did not refuse to agree to mediate or arbitrate or fail to request mediation with respect to the claims of L. C. Grievance Committee, Inc. and Lanca Homeowners, Inc.

4. The claims made in this case by L. C. Grievance Committee, Inc. and Lanca Homeowners, Inc. were "to enforce provisions of" Chapter 723 Fla.Stat.

5. L. C. Grievance Committee, Inc. and Lanca Homeowners, Inc. are "private parties" as are plaintiffs and counterdefendants.

6. By virtue of the Order of the Florida Fourth District Court of Appeal filed December 16, 1987, movants were a "prevailing party" in a proceeding between private parties to enforce provisions of Chapter 723 Fla.Stat.

WHEREFORE, plaintiffs and counterdefendants pray the court enter an Order awarding reasonable attorneys fees and costs to them in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Michael B. Small, Esq. 238 Phipps Plaza, Palm Beach, Florida 33480 this 11th day of January, 1988.

GUNSTER YOAKLEY, CRISER & STEWART, P.A.
Attorneys for Defendant
777 So. Flagler Drive, Suite 500
W. Palm Beach, FL 33401-6194

BY: /s/
EDWARD A. MAROD
Florida Bar No. 238961

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 86-3107 (CL) F

LANTANA CASCADE OF PALM
BEACH, LTD.,a Florida limited
partnership, and JAMES A. SMITH,
as general partner,

Plaintiffs/
Counterdefendants,

vs.

LANCA HOMEOWNERS, INC., a/k/a.
LANCA HOMEOWNERS
ASSOCIATION, INC., AND THE L. C.
GRIEVANCE COMMITTEE, INC.,

Defendants/
Counterclaimants

_____/

COUNTERDEFENDANTS' MOTION TO DISMISS COUNTERCOMPLAINT PURSUANT TO APPELLATE DECISION

Counterdefendants, Lantana Cascade of Palm Beach, Ltd., Edward F. Harris, James A. Smith, and Richard S. Wolfson, by their undersigned attorneys, move the court pursuant to the decision of the Florida Fourth District Court of Appeal filed December 16, 1987 to dismiss the countercomplaint in this action and say:

1. The counterplaintiffs defined in the countercomplaint are L. C. Grievance Committee, Inc.,

and Lanca Homeowners, Inc. ("Lanca") purportedly as class representatives of the class of all mobile home owners in the Lantana Cascade Mobile Home Park.

2. By Order dated January 3, 1987, this court ordered inter alia, that Lanca was not a member of the class which it purported to represent but, nonetheless, that it was an appropriate class representative in this case.

3. By decision set forth in an opinion filed December 16, 1987, the Florida Fourth District Court of Appeal affirmed that portion of this Court's Order which found that Lanca is not a member of the subject class and reversed that portion of the Order which found that Lanca was an appropriate class representative for the mobile home residents.

4. As a result of the foregoing, there is no proper counterplaintiff party to these proceedings having standing to raise the claims which counterplaintiffs purport to raise.

WHEREFORE, counterdefendants pray the court will enter its Order dismissing the countercomplaint brought by Lanca Homeowners, Inc. and L. C. Grievance Committee, Inc., with prejudice for lack of standing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Michael B. Small, Esq. 238 Phipps Plaza, Palm Beach, Florida 33480 this 11th day of January, 1988.

BY:_____
EDWARD A. MAROD
Florida Bar No. 238961

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

LANTANA CASCADE OF PALM BEACH, LTD., et al

Plaintiffs/
Counterdefendants,

vs. CASE NO. 86-3107 (CL) F

LANCA HOMEOWNERS, INC., ET AL.

Defendants/
Counterplaintiffs.

_____/

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE OF PATRICK MCKERNAN

Plaintiffs, Lantana Cascade of Palm Beach, Ltd., and James A. Smith, by their undersigned attorneys, pursuant to Florida Rules of Civil Procedure 1.250(b) and 1.420(a)(1) hereby give notice of voluntary dismissal WITHOUT PREJUDICE of all claims made herein against the individual defendant, Patrick McKernan.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served by mail this 18th day of December, 1987 on Michael Small, Esq. of Small,

Clark and Barris [sic], Attorneys for Defendants, 238 Phipps Plaza, Palm Beach, FL 33408.

GUNSTER, YOAKLEY, CRISER & STEWART, P.A.
Phillips Point, Suite 500
777 South Flagler Drive
West Palm Beach, Florida 33402-4587

BY /s/ EDWARD A. MAROD
Edward A. Marod
Florida Bar No. 238961

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA.
CASE NO. 86-3107 (CL) F

LANTANA CASCADE OF PALM BEACH, LTD.,
A FLORIDA LIMITED PARTNERSHIP, AND
JAMES A. SMITH, AS GENERAL PARTNER,

PLAINTIFFS/COUNTERDEFENDANTS,

VS.

PATRICK MCKERNAN,

DEFENDANT,

AND

LANCA HOMEOWNERS, INC., A/K/A
LANCA HOMEOWNERS ASSOCIATION, INC.
AND THE L.C. GRIEVANCE COMMITTEE, INC.

DEFENDANTS/COUNTERCLAIMANTS,

VS.

EDWARD F. HARRIS AND RICHARD S.
WOLFSON, GENERAL PARTNERS OF
LANTANA CASCADE OF PALM BEACH, LTD.,

ADDITIONAL COUNTERDEFENDANTS.
_____/

- - -

COURT REPORTER'S
TRANSCRIPT OF PROCEEDINGS

The Supreme Court of the United States

HAD BEFORE THE HONORABLE
DANIEL T.K. HURLEY

- - -

LEY & MARSAA COURT REPORTERS, INC.
1551 FORUM PLACE, SUITE 500C, WEST PALM BEACH, FL. 33401

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS, TAKEN BEFORE THE HONORABLE DANIEL T.K. HURLEY IN THE PALM BEACH COUNTY COURTHOUSE, WEST PALM BEACH, FLORIDA, ON DECEMBER 23, 1986.

THE COURT: LET THE RECORD REFLECT THIS IS THE CASE OF LANTANA CASCADE OF PALM BEACH, LIMITED, VERSUS PATRICK MCKERNAN AND LANCA HOMEOWNERS, INC., LANCA HOMEOWNERS ASSOCIATION, INC., AND THE L.C. GRIEVANCE COMMITTEE, INC.

WE ARE PRESENT PURSUANT TO AN EARLIER ORDER OF THE COURT WHICH INDICATED WE WOULD HOLD A HEARING TO DETERMINE THE STATUS OF THE COMMITTEES, WHETHER THEY MET THE PREREQUISITE OF THE STATUTE, AND WHETHER THE OTHER REQUIREMENTS ARE PRESENT FOR CLASS CERTIFICATION.

* * *

MR. MAROD: A LITTLE BRIEF HISTORY. THIS ALL STARTED WHEN WE GOT A LETTER FROM LANCA AND L.C. GRIEVANCE COMMITTEE, INC., THREATENING CERTAIN THINGS IF WE DID NOT DO CERTAIN OTHER THINGS WITHIN SEVEN DAYS. OUR CLIENT FILED THIS ACTION COUNTERING THAT

THREAT TO TRY AND RESOLVE THE TWO PARTICULAR DISPUTED ISSUES, WHETHER OR NOT THESE TWO ENTITIES HAVE STANDING TO REPRESENT THE RESIDENTS . . .

* * *

THEY, OF COURSE, THEN FILED THIS COUNTERCLAIM BY THE TWO CORPORATE ENTITIES SEEKING DAMAGES AS INJUNCTIVE RELIEF AND UNDER THE CONSENT JUDGMENT AND CLAIM UNCONSCIONABLE RENT AT THE PARK.

IN THE COUNTERCLAIM THESE TWO ENTITIES PURPORT LANCA CAN REPRESENT ALL THE TENANTS UNDER THE STATUTE . . .

* * *

UNDER 723.075 IN ORDER FOR A MOBILE HOME OWNERS ASSOCIATION TO BE FORMED IT MUST BE FORMED BY THE MOBILE HOME OWNERS. AND THE OWNERS ARE DEFINED IN THE STATUTE AS PEOPLE WHO OWN A MOBILE HOME AND RENT LOTS, IN WHICH WAY LANCA PURPORTS TO CLAIM UNDER 723 WAS FORMED, NOT BY THE MOBILE HOME OWNERS OF THE PARK BUT BY L.C. GRIEVANCE WHICH IS NEITHER A MOBILE HOME OWNER, NOR A LOT RENTER.

IN ADDITION, THE MINUTES WE HAVE ATTACHED TO OUR MEMORANDUM SHOWS AS OF THE DATE THEY SET THIS CORPORATION ONLY 282 OF THE 462 LOTS WERE RENTED AS MEMBERS OF THE L.C. GRIEVANCE COMMITTEE.

THAT IS IMPORTANT BECAUSE, IF YOU DO THE MATHEMATICS SHOWING THE TWO-THIRDS NECESSARY TO SUBSCRIBE TO ONE OF

THESE ASSOCIATIONS, THE NUMBER IS 308 THAT IS NECESSARY, NOT 282.

IN ADDITION, THE SECRETARY OF LANCA HAS ADMITTED IN DEPOSITION -- WHICH WE WILL ASK TO HAVE ADMITTED IN EVIDENCE DURING OUR PRESENTATION OF TESTIMONY -- THERE WAS NEVER ANY MEETING TO ELECT DIRECTORS, APPOINT OFFICERS. WE BELIEVE THEY HAVE NOT COMPLIED WITH THE STATUTE AND HAVE NO STANDING, NOT WITH LESS THAN TWO-THIRDS OF THE RESIDENTS' CONSENTS IN WRITING TO BE MEMBERS OF THE ASSOCIATION.

AFTER NUMEROUS REQUESTS, WE FINALLY GOT YESTERDAY THAT THICK STACK OF DOCUMENTS WHICH I WILL CALL THE CONSENTS. IF YOU LOOK AT THOSE, EXHIBIT 5 TO OUR MEMORANDUM, YOU CAN SEE THERE ARE ONLY 314 SUCH CONSENTS. THAT NUMBER IS ABOVE THE 308 LEVEL. IF YOU WILL GO THROUGH THEM, YOU WILL FIND NINE OF THE PEOPLE SAY THEY DO NOT WANT TO BECOME MEMBERS OR SHAREHOLDERS OF THE ASSOCIATION, WHICH LEAVES 305, WHICH IS BELOW THE 308 NECESSARY TO MEET THE STATUTE.

IN ADDITION, THERE ARE 107 OF THESE FORMS THAT DO NOT SAY YES OR NO, THAT PART OF THE QUESTIONNAIRE IS COMPLETELY LEFT BLANK. 11 SAY, YES, THEY WOULD LIKE TO BECOME SHAREHOLDERS IF THE PRICE IS RIGHT. AND THE BALANCE SAY, YES, THEY WOULD LIKE TO BECOME SHAREHOLDERS IF WE ARE SUCCESSFUL IN PURCHASING THE PARK FROM THE CURRENT OWNERS.

THE REASON WE ARE HERE TODAY IS THEY HAVE NOT BEEN SUCCESSFUL IN PURCHASING THE PARK.

WE WILL SUBMIT THESE CONSENTS WHICH WILL CLEARLY ESTABLISH THEY HAVE NEVER GOTTEN WRITTEN CONSENTS FROM TWO-THIRDS OF THE MOBILE HOME OWNERS AS REQUIRED TO BE AN ASSOCIATION.

FINALLY, OF COURSE, 723 REQUIRES OFFICERS TO BE ELECTED BY THE MEMBERS. THIS HAS NEVER BEEN DONE. WE SUBMIT LANCA DOES NOT QUALIFY UNDER 723.

* * *

1.220 OR 221, WHICH RELATE TO CLASS ACTIONS 221 APPLIES ONLY TO CONDOMINIUM ASSOCIATIONS. NEITHER OF THESE ENTITIES IS A CONDOMINIUM ASSOCIATION. THE PARK IS NOT, IT THEREFORE CAN'T. 220 THEREFORE, WE SUBMIT, CONTROLS TO THE EXTENT THE PLAINTIFFS WILL ARGUE STATUTE 723 TAKES THE PLACE OF A RULE.

WE SUBMIT AND ARGUE AT LENGTH AVILA SOUTH CONDOMINIUMS, INC., VERSUS CAPA [SIC] FLORIDA, A SUPREME COURT CASE, ESTABLISHES THAT SUCH A STATUTE CANNOT TAKE THE PLACE OF THE RULE BECAUSE THE RULE IS SOMETHING THAT IS THE PREROGATIVE OF THE SUPREME COURT WHICH CONTROLS WHO MAY BE A PARTY TO THE COURT AND ANY ATTEMPT BY THE LEGISLATURE TO INVADE IS UNCONSTITUTIONAL. THEY DID NOT SAY AN ASSOCIATION HAS A RIGHT TO BE A CLASS REPRESENTATIVE. THEY SAY IF THE ASSOCIATION HAS THE RIGHT TO BE A CLASS REPRESENTATIVE, IT CAN BE JOINED IN A CLASS ACTION. WE SUBMIT THAT THAT MEANS THE LEGISLATURE IS ACKNOWLEDGING THE AVILA SOUTH CASE, IS SAYING YOU HAVE TO APPLY 1.220. IF YOU DO, YOU CAN BE IN A CLASS ACTION.

* * *

MR. RAPP: WE HAVE SOME HOUSEKEEPING. WE HAVE THE ORIGINAL TRANSCRIPTS OF THE DEPOSITIONS OF THE PEOPLE THAT ARE THE OFFICERS AND DIRECTORS OF THESE TWO CORPORATIONS THAT WE WOULD LIKE TO OFFER.

THE COURT: YOU WANT TO ACTUALLY PUT THAT IN EVIDENCE?

MR. RAPP: I WANT TO REFER TO PORTIONS OF THEM.

THE COURT: THEN THEY WILL BE FILED.

* * *

MR. MAROD: ON THE MAIN COMPLAINT WE ARE NOT ARGUING THE STATUTE IS UNCONSTITUTIONAL. WE UNDERSTOOD THIS HEARING TODAY TO BE A HEARING TO DETERMINE WHETHER EITHER OF THE COUNTERPLAINTIFFS CAN REPRESENT A CLASS. NOT JUST LIMITED TO 075, BUT GOING BEYOND THAT TO WHATEVER COMMON LAW RULES OR RULES TO DETERMINE CLASS REPRESENTATIVES.

IN THAT CONTEXT OUR ARGUMENT IS, EVEN IF YOU DETERMINE THAT LANCA IS APPROPRIATE UNDER 723.075 CONDOMINIUM ASSOCIATION, MOBILE HOME OWNERS ASSOCIATION, THAT DOES NOT GIVE THEM THE AUTOMATIC RIGHT TO BE A CLASS REPRESENTATIVE UNDER RULE 1220 OR 221 TO THE EXTENT THAT THERE IS ANY ARGUMENT OR SUGGESTION HERE TODAY THAT BY VIRTUE OF THE STATUTE AND THE STATUTE ALONE, IN THE ABSENCE OF A RULE OF THE FLORIDA SUPREME COURT SAYING A CONDOMINIUM

ASSOCIATION UNDER 723 HAVE THE RIGHT TO DO CLASS ACTIONS THE WAY CONDOMINIUM ASSOCIATIONS DO.

IT IS ABSOLUTELY OUR POSITION THAT CANNOT BE DONE BECAUSE IT IS UNCONSTITUTIONAL UNDER AVILA SOUTH.

IF THEY WANT TO MAKE THEMSELVES A CLASS REPRESENTATIVE, EVEN ASSUMING THEY ARE -- THEY MUST COMPLY WITH 1.220 -- [NOT] 075. A TENANT OF THE PARK, A MOBILE HOME OWNER, HAVE CLAIMS COMMON TO THE CLASS, THE CLAIMS OF THE CLASS MUST BE COMMON AMONG EACH OTHER. THERE MUST BE PROOF OF ADEQUATE REPRESENTATION AND SO FORTH.

WE WOULD SUBMIT, BASED ON THE RECORD HERE TODAY, IT IS CLEAR THAT THEY DO NOT HAVE COMMON CLAIMS INCLUDING THE DEPOSITIONS. MR. RAPP WAS TRYING TO AVOID THE NECESSITY OF LOOKING AT ALL OF THE DIFFERENCES THERE ARE BECAUSE OF THE ABSENCE OF COMMON CLAIM EITHER LAW OR FACT BECAUSE OF THE FACT LANCA OR L.C., NEITHER ONE IS A RESIDENT OF THIS PARK, A TENANT OF THE PARK OR AN OWNER OF A MOBILE HOME. AND SINCE THE ALLEGATIONS OF THE COUNTERCLAIM ITSELF DO NOT EVEN PURPORT TO SAY THAT LANCA OR L.C. ITSELF WAS INJURED AND IS ENTITLED TO HAVE RELIEF. THIS COURT SHOULD RULE NEITHER LANCA NOR L.C, HAS THE POWER TO REPRESENT AS A CLASS REPRESENTATIVE IN A CLASS ACTION IN THIS COUNTERCLAIM THESE TENANTS. AND, IN FACT, THE ENTIRE COUNTERCLAIM WITH THE EXCEPTION OF POSSIBLY COUNT I SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

* * *

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA.
CASE NO. 86-3107 (CL) F

LANTANA CASCADE OF PALM BEACH, LTD.,
A FLORIDA LIMITED PARTNERSHIP, AND
JAMES A. SMITH, AS GENERAL PARTNER,

PLAINTIFFS/COUNTERDEFENDANTS,

VS.

PATRICK MCKERNAN,

DEFENDANT,

AND

LANCA HOMEOWNERS, INC., A/K/A
LANCA HOMEOWNERS ASSOCIATION, INC.
AND THE L.C. GRIEVANCE COMMITTEE, INC.

DEFENDANTS/COUNTERCLAIMANTS,

VS.

EDWARD F. HARRIS AND RICHARD S.
WOLFSON, GENERAL PARTNERS OF
LANTANA CASCADE OF PALM BEACH, LTD.,

ADDITIONAL COUNTERDEFENDANTS.
----------/

- - -

DEPOSITION OF THE WITNESS,

ELIZABETH C. CHEESEMAN,
TAKEN BY THE PLAINTIFFS,
ON TUESDAY, OCTOBER 28, 1986

* * *

THEREUPON,

ELIZABETH C. CHEESEMAN, AFTER HAVING BEEN FIRST SWORN BY ME TO TELL THE WHOLE TRUTH AS HEREINAFTER CERTIFIED, TESTIFIED AS FOLLOWS:

* * *

Q. [BY MR. MAROD]: DO YOU RECALL HOW IT WAS THAT YOU CAME TO BE MADE A SECRETARY AND A DIRECTOR OF LANCA HOMEOWNERS? WAS IT BY APPOINTMENT? WAS IT BY ELECTION? WAS IT BY FORCE?

A. [BY ELIZABETH C. CHEESEMAN]: THE SAME OFFICERS THAT WERE OFFICERS IN L.C. GRIEVANCE COMMITTEE BECAME THE SAME OFFICERS IN LANCA CORPORATION WHEN IT WAS FORMED. I AM SECRETARY OF L.C. GRIEVANCE OVER MY PROTEST.

Q. WHO MADE THAT DECISION?

A. THAT I WOULD BE SECRETARY OF L.C. GRIEVANCE?

Q. NO. THAT THE OFFICERS OF L.C. GRIEVANCE COMMITTEE WOULD BE THE OFFICERS OF LANCA AND THE DIRECTORS OF L.C. GRIEVANCE WOULD BE THE DIRECTORS OF LANCA?

A. TO THE BEST OF MY RECOLLECTION IT WAS THE ATTORNEY.

* * *

Q. ARE RECORDS KEPT OF THE IDENTITY OF THE MEMBERS OF LANCA HOMEOWNERS?

A. THE ORIGINAL MEMBERS?

Q. ALL THE MEMBERS, NOT JUST THE ORIGINAL ONES. I WANT TO KNOW IF THERE ARE RECORDS OF THE IDENTITY OF ALL OF THE MEMBERS WHICH WOULD SHOW WHO THE MEMBERS ARE AT THE PRESENT TIME.

A. NO.

* * *

Q. DO YOU RECALL APPROXI-MATELY HOW MANY PEOPLE WERE THERE?

A. NO, I'M SORRY, I DON'T. NOT AS MANY AS THERE ARE LATER IN THE SEASON BECAUSE IN OCTOBER THE PEOPLE ARE NOT BACK IN THE PARK YET.

* * *

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA.
CASE NO. 86-3107 (CL) F

LANTANA CASCADE OF PALM BEACH, LTD.,
A FLORIDA LIMITED PARTNERSHIP, AND
JAMES A. SMITH, AS GENERAL PARTNER,

PLAINTIFFS/COUNTERDEFENDANTS,

VS.

PATRICK MCKERNAN,

DEFENDANT,

AND

LANCA HOMEOWNERS, INC., A/K/A
LANCA HOMEOWNERS ASSOCIATION, INC.
AND THE L.C. GRIEVANCE COMMITTEE, INC.

DEFENDANTS/COUNTERCLAIMANTS,

VS.

EDWARD F. HARRIS AND RICHARD S.
WOLFSON, GENERAL PARTNERS OF
LANTANA CASCADE OF PALM BEACH, LTD.,

ADDITIONAL COUNTERDEFENDANTS.
----------/

- - -

DEPOSITION OF THE WITNESS,

PATRICK MCKERNAN
TAKEN BY THE PLAINTIFFS,
ON MONDAY, NOVEMBER 24, 1986

- - -

* * *

THEREUPON,

PATRICK MCKERNAN, AFTER HAVING BEEN FIRST SWORN BY ME TO TELL THE WHOLE TRUTH AS HEREINAFTER CERTIFIED, TESTIFIED AS FOLLOWS:

* * *

Q. [BY MR. RAPP]: DO YOU LIVE THERE YEAR ROUND OR ARE YOU SEASONAL?

A [BY PATRICK McKERNAN]:. I LIVE YEAR ROUND.

Q. ARE SOME OF THE TENANTS SEASONAL RESIDENTS?

A. YES.

Q. ABOUT HOW MANY ARE SEASONAL?

A. I WOULD SAY APPROXIMATELY SIXTY PERCENT.

* * *

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 86-3107 (CL) F

LANTANA CASCADE OF PALM BEACH, LTD., a Florida limited partnership, and JAMES A. SMITH, as general partner,

Plaintiffs/
Counterdefendants,

vs.

PATRICK MCKERNAN,

Defendant,

and

LANCA HOMEOWNERS, INC., a/k/a LANCA HOMEOWNERS ASSOCIATION, INC. AND THE L. C. GRIEVANCE COMMITTEE, INC.,

Defendants/
Counterclaimants,

vs.

EDWARD F. HARRIS AND

The Supreme Court of the United States

RICHARD S. WOLFSON, General Partners of Lantana Cascade of Palm Beach, Ltd.,

Additional Counterdefendants.

---/

ORDER

THIS CAUSE, having come on to be heard upon the filing of a Motion to Reschedule Hearing previously scheduled by Order of this court for September 2, 1986 and in response to that portion of the defendants/counterplaintiffs' Motion for Rehearing of this court's Order of August 7, 1986 scheduling an evidentiary hearing for September 2, 1986, Notice of Hearing having been furnished to counsel of record and a hearing having been conducted by this court, at which the president for the two defendant/counterplaintiff associations, who is also individually named in this law suit, was present at a hearing conducted by the court and the court having noted that a substantial number of the residents/tenants of the Lantana Cascade Mobile Home Park and officers and directors of the defendant/counterplaintiff associations are not in residence during this season of the year, and the court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the Motion to Reschedule Hearing previously set for September 2, 1986 and that portion of the Motion for Rehearing which pertains to this court's Order of August 7, 1986 scheduling an evidentiary hearing for September 2, 1986, be and the same is hereby granted and the evidentiary hearing to determine class representation previously scheduled for September 2, 1986 is cancelled to be rescheduled for December 23, 1986 at 1:30 p.m., in Room 437, County

Courthouse, West Palm Beach, Florida to determine the right of the defendant/counterplaintiffs to represent the class of tenants (See Section 723.075 and 723.079, Florida Statutes (1985)).

DONE AND ORDERED at West Palm Beach, Florida this 8th day of September, 1986.

/s/ DANIEL K. HURLEY
DANIEL K. HURLEY, CIRCUIT COURT JUDGE

Copies furnished to:

Edward A. Marod, Esq., 777 S. Flagler Drive, West Palm Beach, Florida

Michael B. Small, Esq., 238 Phipps Plaza, Palm Beach, Florida 33480

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY

CASE NO. 86-3107 CL F

LANTANA CASCADE OF PALM BEACH, LTD., a Florida limited partnership, and JAMES A. SMITH, as general partner,

Plaintiffs/
Counterdefendants,

vs.

PATRICK McKERNAN,

Defendant,

and

LANCA HOMEOWNERS, INC., a/k/a LANCA HOMEOWNERS ASSOCIATION, INC. and THE L. C. GRIEVANCE COMMITTEE, INC.,

Defendants/
Counterclaimants,

vs.

EDWARD F. HARRIS and

RICHARD S. WOLFSON, General
Partners of Lantana Cascade of Palm
Beach, Ltd.,

Additional
Counterdefendants.

_____/

ORDER

On June 14, 1986, the court entered an order authorizing the clerk to disburse monies to the plaintiff/park owner. The June 14th order further instructed the clerk to disburse all sums which might be depositied [sic] into the registry of the court in the future.

Prior to the entry of the June 14th order, the court determined that the plaintiff/park owner had demonstrated the existence of personal hardship resulting from the loss of rental income so as to justify the invocation of section 723.063(3), Florida Statutes (1985). Upon further consideration, the court has determined that it would be a useless and wasteful exercise to permit future deposits of rent money into the court's registry only to allow those monies to be released immediately to the plaintiff/part owner. Accordingly, it is

ORDERED AND ADJUDGED that the clerk of this court shall decline to accept any further deposits from the defendants into the registry of the court. Future rental payments shall be paid directly tc the plaintiff/park owner. And it is further,

ORDERED AND ADJUDGED that the court shall conduct an evidentiary hearing on Tuesday, September 2nd, 1986 at 10:30 a.m. in Room 437 to determine the right of the defendants/counter-plaintiffs to represent a

class. See Sections 723.075 and 723.079, Florida Statutes (1985).

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 7th day of August, 1986.

SIGNED AND DATED
AUG 7 1986

/s/JUDGE DANIEL T. K. HURLEY
Daniel T. K. Hurley
Circuit Court Judge

copies furnished:

Edward A. Marod, Esq., 777 S. Flagler Dr., Suite 500, West Palm Beach, Fl. 33401-6194

Michael B. Small, Esq., 238 Phipps Plaza, Palm Beach, Fl. 33480

IN THE CIRCUIT COURT FOR
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 86-3107 CL F

LANTANA CASCADE OF PALM BECH [sic], LTD., a Florida limited partnership, and JAMES A. SMITH, as general partner,

Plaintiffs,

vs.

LANCA HOMEOWNERS, INC., a/k/a LANCA HOMEOWNERS ASSOCIATION, INC., THE L.C. GRIEVANCE COMMITTEE, INC.,and PATRICK McKERNAN,

Defendants.

_____ /

COUNTER COMPLAINT

COMES NOW L.C. Grievance Committee, Inc., a Florida not for profit corporation and Lanca Homeowners, Inc., a Florida not for profit corporation, in their representative capacity as representatives of their membership and the class of mobile homeowners in the Lantana Cascade Mobile Home Park and counter-sue the defendants Lantana Cascade Mobile Home Park; Edward F. Harris, James Smith and Richard S. Wolfson, general partners of Lantana--Cascade of Palm Beach, Limited jointly and severally and say:

GENERAL ALLEGATIONS

1. This is a civil action for injunctive and declaratory relief, general and punitive damages in excess of the jurisdictional minimum of $5,000.00.

"THE COUNTERPLAINTIFFS"

2. The plaintiff L.C. Grievance Committee, Inc., is a Florida not for profit corporation with its principal offices in the Lantana Cascade Mobile Home Park, Lantana, Palm Beach County, Florida and its prime purpose is to represent the mobile homeowners of the Lantana Cascade Mobile Home Park in matters of dispute or grievance with the ownership and management of the mobile home park.

3. The plaintiff Lanca Homeowners, Inc., is a Florida not for profit corporation with its principal offices in the Lantana Mobile Home Park, Lantana, Palm Beach County, Florida and its prime purpose is to represent the mobile homeowners in furtherance of the interests of the mobile homeowners in the Lantana Cascade Mobile Home Park.

"CLASS REPRESENTATION ALLEGATIONS"

4. The members of the class of mobile homeowners in the Lantana Cascade Mobile Homeowners in the Lantana Cascade Mobile Home Park are so numerous that separate joinder of each member is impracticable. However, each member who chooses to participate and to deposit the disputed rental in the registry of the court, will be listed on a detailed statement attached to the "Notice of Deposit into the Registry of the Court". Each month when the disputed rental is due, starting with the May, 1986 rental, each participating mobile homeowner will deposit his/her/their rental, together with all of the other

disputed rentals from the other members of the class, into the registry of the court.

5. The claims of the mobie [sic] homeowners in the Lantana Cascade Mobile Home Park are common in nature and raise questions of law and/or fact common to questions of law or fact raised by the claim of each member of the class. The claims as recited herein are all claims which are common of nature refer to common elements, common concerns, common rentals, common reduced services, common lack of maintenance and common deterioration of the Lantana Cascade Mobile Home Park.

6. The claims to be brought by the class representatives are typical of each claim of each member of the class.

7. The representative parties, since it is their prime purpose to represent the interest of the mobile homeowners in the Lantana Cascade Mobile Home Park, having previously been formed or designated to do so, can best and most adequately protect and represent the interest of each member of the class.

8. The prosecution of the separate claims of the mobile homeowners, which in essence are the same and are common, by individual members of the class would create a risk of inconsistent or varying adjudications concerning individual members of the class and would establish incompatible standards of conduct for the party opposing the class, as well as creating a risk that the adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interest of other members of the class, who are not parties to the adjudications, would substantially impair or impead [sic] the ability of the other members of the class who are not the parties to the adjudications, to protect or further their interests.

9. Lanca Homeowners, Inc., a Florida not for profit corporation, hereinafter referred to as "Lanca" was formed in accordance with F.S. 723.075 (1), 723.077,723,078 and is authorized to represent the class of mobile homeowners of the Lantana Cascade Mobile Home Park provided in F.S. 723.071. More than two thirds of all of the mobile homeowners within the park did consent in writing to become members of "Lanca".

10. The claims of the class, consisting of questions of law and fact are common to the claims of each member of the class and predominant over any question of law or fact, affecting only individual members of the class.

11. The class representatives each represent over 2/3 of the mobile homeowners within the Lantana Cascade Mobile Home Park.

* * *

WHEREFORE, counterplaintiffs pray:

* * *

c) For general damages in excess of $5,000.00;

d) For punitive damages in excess of $5,000.00;

e) For attorney fees and court costs;

f) For such other and further relief as this court shall deem appropriate and proper.

* * *

WHEREFORE, plaintiffs pray:

* * *

b) For general damages in excess of $5,000.00;

* * *

d) For court costs and attorney fees;

e) For such other and further relief as this court shall deem appropriate.

* * *

WHEREFORE, counterplaintiffs pray:

* * *

iv) Require the counterdefendants to appropriately roll back its rent structure to an amount which this court shall find does not constitute the charging of unconscionable rent, and order a rebate to the counterplaintiffs of the difference between the conscionable and unconscionable rent found by the court and of the reduced rent caused by the non-compliance;

* * *

e) That the court award to counterplaintiffs their costs and reasonable attorney's fees.

* * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been hand delivered to to [sic] Edward A.

Marod, Esq., 777 South Flagler Drive, Suite 500, West Palm Beach, Florida 33401-6194 this 2nd day of May, 1986.

Respectfully,

SMALL, CLARK & BERRIS

By /s/ MICHAEL B. SMALL
MICHAEL B. SMALL, ESQ.
Attorneys for the Defendants
238 Phipps Plaza
Palm Beach, Florida 33480
Tel: (305) 833-1100

represent the interest of the mobile home owners who rent lots at Lantana Cascade Mobile Home Park.

22. Chapter 84-80, Laws of Florida, as enacted at §723.075, Florida Statutes (1985) governs the right of corporations to act as representatives of mobile home owners renting lots in mobile home parks in all matters relating to Chapter 723, Florida Statutes.

23. Section 723.075(1), Fla. Stat. (1985) provides in pertinent part:

> In order to exercise the rights provided in §723.071, the mobile home owners shall form an association in compliance with this section and §§723.077, 723.078, and 723.079, which shall be a corporation for profit or not for profit and of which not less than two thirds of all of the mobile home owners within the park shall have consented, in writing, to become members or shareholders. Upon such consent by two-thirds of the mobile home owners, all consenting mobile home owners in the park and their successors shall become members of the association and shall be bound by the provisions of the articles of incorporation, the by-laws of the association, and such restrictions as may be properly promulgated pursuant thereto . . .[emphasis added].

24. Upon information and belief, less than two-thirds of all of the mobile home owners within Lantana Cascade Mobile Home Park have consented in writing to become shareholders of either Lanca or L.C.

25. Based upon the foregoing, Plaintiff is in doubt of the authority of either Lanca or L.C. to be the representative of the mobile home owners of

supplemental relief of which the Court has jurisdiction pursuant to §86.011, Fla. Stat. (1985).

2. Plaintiff, Lantana Cascade of Palm Beach, Ltd., is a Florida limited partnership having its principal place of business in Palm Beach County, Florida. James A. Smith is a general Partner of Lantana Cascade of Palm Beach, Ltd. Plaintiff is the owner of Lantana Cascade Mobile Home Park located in unincorporated Palm Beach County in close proximity to Lantana, Florida.

3. Defendant, Lanca Homeowners, Inc. a/k/a Lanca Homeowners Association, Inc., (hereinafter "Lanca") is a Florida corporation having its principal place of business at 1645 Palm Beach Lakes Boulevard, West Palm Beach, Florida. Lanca purports to be a "homeowners association pursuant to Chapter 723, Florida Statutes" authorized to represent the mobile home owners who rent lots in Lantana Cascade Mobile Home Park, but Plaintiff is without knowledge of the truth of such assertion.

4. Defendant, L.C. Grievance Committee, Inc., (hereinafter "L.C.") is a Florida corporation which likewise purports to be a "homeowners association pursuant to Chapter 723, Florida Statutes" authorized to represent the mobile home owners who rent lots in Lantana Cascade Mobile Home Park, but Plaintiff is without knowledge of the truth of such assertion.

5. Defendant, Patrick McKernan is the president of Lanca Homeowners, Inc., and L.C. and is a mobile home owner who rents a lot at Lantana Cascade Mobile Home Park.

6. Plaintiff has owned Lantana Cascade Mobile Home Park since at least 1975.

7. Lantana Cascade Mobile Home Park has 462 rental lots and has operated as a mobile home park continually since at least 1975.

* * *

17. On or about March 24, 1986, Lanca and L.C. purportedly as representatives of the mobile home owners who rent lots at Lantana Cascade Mobile Home Park, delivered to Plaintiff a letter, a copy of which is attached hereto as Exhibit 8. In said letter, Lanca and L.C. purported to give notice that if the many alleged "deficiencies" in Lantana Cascade Mobile Home Park generally described in the letter were not remedied before April 1, 1986, that rents would not be paid by the mobile home owners Lanca and L.C. purported to represent on April 1, but instead would be deposited in the registry of the Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County.

18. Plaintiff disputes the claims set forth in the letter a copy of which is attached hereto as Exhibit 8 and disputes the right of Lanca, L.C., and Patrick McKernan to do the acts threatened in the letter.

19. As of the close of business on April 1, 1986, in excess of 300 mobile home owners who rent lots at Lantana Cascade Mobile Home Park have failed or refused to pay the rent due for their lots.

COUNT I

20. Paragraphs 1 through 19 are realleged.

21. This is an action for declaratory judgment of the standing of Lanca and L.C. to represent the interest of the mobile home owners who rent lots at Lantana Cascade Mobile Home Park.

22. Chapter 84-80, Laws of Florida, as enacted at §723.075, Florida Statutes (1985) governs the right of corporations to act as representatives of mobile home owners renting lots in mobile home parks in all matters relating to Chapter 723, Florida Statutes.

23. Section 723.075(1), Fla. Stat. (1985) provides in pertinent part:

> In order to exercise the rights provided in §723.071, the mobile home owners shall form an association in compliance with this section and §§723.077, 723.078, and 723.079, which shall be a corporation for profit or not for profit and of which not less than two thirds of all of the mobile home owners within the park shall have consented, in writing, to become members or shareholders. Upon such consent by two-thirds of the mobile home owners, all consenting mobile home owners in the park and their successors shall become members of the association and shall be bound by the provisions of the articles of incorporation, the by-laws of the association, and such restrictions as may be properly promulgated pursuant thereto . . .[emphasis added].

24. Upon information and belief, less than two-thirds of all of the mobile home owners within Lantana Cascade Mobile Home Park have consented in writing to become shareholders of either Lanca or L.C.

25. Based upon the foregoing, Plaintiff is in doubt of the authority of either Lanca or L.C. to be the representative of the mobile home owners of Lantana Cascade Mobile Home Park in matters relating to Chapter 723, Florida Statutes (1985).

26. All conditions precedent to the relief demanded have been performed or have occurred.

WHEREFORE, Plaintiff demands judgment declaring whether either Lanca Homeowners, Inc., or L.C., is authorized to be the representative of the mobile home owners of Lantana Cascade Mobile Home Park in matters relating to Chapter 723, Florida Statutes (1985) together with the costs of this action and such other relief as the Court deems appropriate in the circumstances.

* * *

GUNSTER, YOAKLEY, CRISER & STEWART, P.A.
777 South Flagler Drive, Suite 500
West Palm Beach, Florida 33401-6194
(305) 655-1980
Attorney for Plaintiff

By:/s/ EDWARD A. MAROD
EDWARD A. MAROD

Filed: April 2, 1986

The Supreme Court of the United States

EXHIBIT 8

SMALL, CLARK & BERRIS
Attorneys at Law

March 24, 1986

Lantana Cascade Mobile Home Park
and
Lantana--Cascade of Palm Beach,
Limited
Attention: All of its General Partners
James A. Smith, General Partner
Edward F. Harris, General Partner
Richard S. Wolfson, General Partner

* * *

Re: Notification of Material Non-Compliance and Notice of Intent to Pay April, 1986 Rent into the Registry of the Court Pursuant to the Provisions of Section 723.063, Florida Statutes

Gentlemen:

Please be advised that this office has been retained by and continues to represent the L.C. Grievance Committee, Inc., a Florida corporation, identified in that certain consent judgment under date of July 25, 1975 in the case styled as "Tenants of Lantana Cascade Mobile Home Park" vs. The Churchill Group, et al., case no: 75-1257 CA(L)01D and a Florida corporation, consisting of the mobile home owners in the Lantana Cascade Mobile Home Park. The L.C. Grievance Committee, Inc., and Lanca Homeowners, Inc., in their representative capacity, give notice of numerous incidents of material non-compliance by you as the ownership and

management of the Lantana Cascade Mobile Home Park. The L. C. Grievance Committee, Inc. and Lanca Homeowners, Inc., in their representative capacity, give notice that unless all of the items of material non-compliance have been remedied, corrected, removed, modified or replaced, as the case may be, within seven days, that the unit owners represented by L.C. Grievance Committee, Inc. and Lanca Homeowners, Inc., intend not to pay rent based upon ownership's and management's non-compliance, as detailed herein. In the event of ownership's and management's failure to timely comply, it is the intent of the mobile home owners represented by L.C. Grievance Committee, Inc., and Lanca Homeowners, Inc., to pay the rent when due into the registry of the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida and to continue to pay such rent as it accrues and becomes due into the registry of the court.

The L.C. Grievance Committee, Inc., and Lanca Homeowners, Inc., in their respective representative capacities, give notice of the following items of material non-compliance by the ownership and management of the Lantana Cascade Mobile Home Park and respectfully demand compliance within seven days from notification, to wit:

1. Failure to comply with the disclosure requirements of the Perspectus [sic] as required by F.S. 723.012, in particular paragraphs (4), (5), (6), (7), (8), (9), (10), (11), (12) and (13) of Section 723.012, F.S.;

2. Failure to comply with Section 723.011, (1), (2) and (3);

3. Failure to comply with Section 723.017, F.S. by making false and information required, including, but not limited to mention of the existence of a "wrap-around" mortgage and security agreement

between Lantana--Cascade of Palm Beach, Limited and Balcor Pension Investors IV under date of December 19, 1983 and recorded in ORB 4121, Page 243, Palm Beach County, Florida records;

4. Failure to exercise the obligation of good faith and fair dealings in ownership and management's performance or enforcement of statutory obligations contained in Chapter 723, provisions of the rental agreement and rules and regulations, pursuant to Section 723.021, F.S.;

5. Failure to comply with the requirements of applicable building, housing and health codes in the maintenance and management of the Lantana Cascade Mobile Home Park pursuant to the provisions of Section 723.022, F.S.;

* * *

10. Reductions of services, access and use of facilities and maintenance in the park in violation of the provisions of Section 723.037, F.S.;

11. Improper lot rental increases in violation of the provisions of Section 723.037, such rental increases being unreasonable, particularly in light of the decrease in services, access to common areas and facilities and use of utilities;

12. Violation of the rules of the Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes, to wit:

    a) Rule 7030.02(4)(b)--failure to deliver Perspectus [sic] to homeowners;

    b) Rule 7031.01(1)--failure to comply with the requirements by providing a Perspectus [sic] which fails to detail and include all

pertinent data necessary to inform and justify an increase;

c) Rule 7031.01(6)(a)--failure to timely notify mobile homeowners of 1985 rental increase;

d) Rule 7031(6)(b)--failure to include and disclose all details and charges pertinent to rental increase;

e) Rule 7031.01(6)(c)--failure to properly describe all factors including detail and charges for rental increase;

* * *

l) Rule 7032.02(1) through (3)--improper lot rental increase, reduction in services and use and access of utilities.

13. Failure and breach of the consent judgment of July 25, 1975 in case no 75-1257 CA(L)01D, to wit:

* * *

15. Illegal, improper and unreasonable rental increases from September 1, 1980 through September 1, 1985;

* * *

YOU ARE HEREBY PUT ON NOTICE that the mobile home owners of the Lantana Cascade Mobile Home Park respectfully demand that each and every one of the above referenced violations, defaults, reductions or failures be remedied within seven days and for your failure to do so, the mobile home owners shall pay the April, 1986 rent as due into the registry of the Fifteenth

Judicial Circuit Court in and for Palm Beach County, Florida. It is the intent of the mobile home owners, through their class representative the L.C. Grievance Committee, Inc., and Lanca Homeowners, Inc., to present their claims to a jury for damages and for reduction of the rent during the period of non-compliance.

Please govern yourselves accordingly.

Very truly yours,

L.C. GRIEVANCE COMMITTEE, INC.

By_____
PATRICK McKERNAN, as
its President

LANCA HOMEOWNERS ASSOCIATION, INC.

By_____
PATRICK McKERNAN, as
its President and Chairman

Respectfully,

SMALL, CLARK & BERRIS
Attorneys for Lanca Homeowners, Inc., and
L.C. Grievance Committee, Inc.

By_____
MICHAEL B. SMALL, ESQ.

The pertinent provisions of the United States Constitution are as follows:

AMENDMENT V.

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to witness against himself, nor *be deprived of* life, limb, or *property, without due process of law*; nor shall private property be taken for public use without just compensation. [*Emphasis added*]

AMENDMENT XIV; SECTION 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall* make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State *deprive any person of* life, liberty, or *property, without due process of law*; nor deny any person within its jurisdiction the equal protection of the laws. [*Emphasis added*]

The Florida statute authorizing the creation of mobile homeowners' associations is §723.075(1), Fla. Stat. (1985) which provides:

> (1) In order to exercise the rights provided in s. 723.071, the mobile home owners shall form an association in compliance with this section and ss. 723.077, 723.078, and 723.079, which shall be a corporation for profit or not for profit and of which not less than two-thirds of all of the mobile home owners within the park shall have consented, in writing, to become members or shareholders. Upon such consent by two-thirds of the mobile home owners, all consenting mobile home owners in the park and their successors shall become members of the association and shall be bound by the provisions of the articles of incorporation, the bylaws of the association, and such restrictions as may be properly promulgated pursuant thereto. The association shall have no member or shareholder who is not a bona fide owner of a mobile home located in the park. Upon incorporation and service of the notice described in s. 723.076, the association shall become the representative of the mobile home owners in all matters relating to this chapter.

The statutes governing mobile homeowners' associations in Florida are §§723.076 - .079, Fla. Stat (1987) which provide:

> **723.076 Incorporation; notification of park owner.**
>
> (1) Upon receipt of its certificate of incorporation, the homeowners' association shall notify the park owner in writing of such incorporation and shall advise the park owner of the names and addresses of the officers of the homeowners' association by personal delivery upon the park owner's representative as designated in the prospectus or by certified mail, return receipt requested.
>
> (2) The homeowners' association shall file a notice of its right to purchase the mobile home park as set forth in s. 723.071. The notice shall contain the name of the association, the name of the park owner, and the address or legal description of the park. The notice shall be recorded with the clerk of the circuit court in the county where the mobile home park is located. Within 10 days of the recording, the homeowners' association shall provide a copy of the recorded notice to the park owner at the address provided by the park owner by certified mail, return receipt requested.
>
> **723.077 Articles of incorporation.** -- The articles of incorporation of a homeowners' association shall provide:
>
> (1) That the association has the power to negotiate for, acquire, and

operate the mobile home park on behalf of the mobile home owners.

(2) For the conversion of the mobile home park once acquired to a condominium, a cooperative form of ownership, or another type of ownership.

Upon acquisition of the property, the association shall be the entity that creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business or, if the homeowners choose a different form of ownership, the entity that owns the record interest in the property and that is responsible for the operation of property.

723.078 Bylaws of homeowners' associations. --In order for a homeowners' association to exercise the rights provided ins.723.071, the bylaws of the association shall provide for the following:

(1) The directors of the association and the operation shall be governed by the bylaws.

(2) The bylaws shall provide and, if they do not, shall be deemed to include, the following provisions:

(a) The form of administration of the association shall be described, providing for the titles of the officers and for a board of directors and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and board members. Unless otherwise provided in the bylaws, the board of

directors shall be composed of five members. The board of directors shall be composed of five members. The board of directors shall have a president, secretary, and treasurer who shall perform the duties of those offices customarily performed by officers of corporations, and these officers shall serve without compensation and at the pleasure of the board of directors. The board of directors may appoint and designate other officers and grant them those duties it deems appropriate.

(b) A majority of the members shall constitute a quorum. Decisions shall be made by a majority of members represented at a meeting at which a quorum is present. In addition, provision shall be made in the bylaws for definition and use of proxy. Any proxy given shall be effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a period longer than 90 days after the date of the first meeting for which it was given. Every proxy shall be revocable at any time at the pleasure of the member executing it.

(c) Meetings of the board of directors shall be open to all members, and notice of meetings shall be posted in a conspicuous place upon the park property at least 48 hours in advance, except in an emergency. Notice of any meeting in which assessments against members are to be considered for any reason shall specifically contain a statement that assessments will be considered and the nature of such assessments.

(d) Members shall meet at least once each calendar year, and the meeting shall be the annual meeting. All members of the board of directors shall be elected at the annual meeting unless the bylaws provide for staggered election terms or for their election at another meeting. The bylaws shall not restrict any member desiring to be a candidate for board membership from being nominated from the floor. The bylaws shall provide the method for calling the meetings of the members, including annual meetings. The method shall provide at least 14 days' written notice to each member in advance of the meeting and require the posting in a conspicuous place on the park property of a notice of the meeting at least 14 days prior to the meeting. Unless a member waives in writing the right to receive notice of the annual meeting by mail, the notice of the annual meeting shall be sent by mail to each member, and the mailing constitutes notice. An officer of the association shall provide an affidavit affirming that the notices were mailed or hand delivered in accordance with the provisions of this section to each member at the address last furnished to the corporation. These meeting requirements do not prevent members from waiving notice of meetings or from acting by written agreement without meetings, if allowed by the bylaws.

(e) Minutes of all meetings of members and of the board of directors shall be kept in a businesslike manner and shall be available for inspection by members, or their authorized representatives, and board members at

reasonable times. The association shall retain these minutes for a period of not less than 7 years.

(f) The share or percentage of, and manner of sharing, expenses for each member shall be stated.

(g) The board of directors shall mail a meeting notice and copies of the proposed annual budget of expenses to the members not less than 30 days prior to the meeting at which the budget will be considered. If the bylaws provide that the budget may be adopted by the board of directors, the members shall be given written notice of the time and place at which the meeting of the board of directors to consider the budget will be held. The meeting shall be open to the members.

(h) The board of directors may, in any event, propose a budget to the members at a meeting of members or in writing, and, if the budget or proposed budget is approved by the members at the meeting or by a majority of their whole number in writing, that budget shall be adopted.

(i) The manner of collecting from the members their shares of the expenses for maintenance of the park property shall be stated. Assessments shall be made against members not less frequently than quarterly, in amounts no less than are required to provide funds in advance for payments of all of the anticipated current operating expenses and for all of the unpaid operating expense previously incurred.

(j) The method by which the bylaws may be amended consistent with the provisions of this chapter shall be stated. If the bylaws fail to provide a

method of amendment, the bylaws may be amended if the amendment is approved by no less than two-thirds of the members. No bylaw shall be revised or amended by reference to its title or number only.

(k) The officers and directors of the association have a fiduciary relationship to the members.

(l) Any member of the board of directors may be recalled and removed from office with or without cause by the vote of or agreement in writing by a majority of all members. A special meeting of the members to recall a member or members of the board of directors may be called by 10 percent of the members giving notice of the meeting as required for a meeting of members, and the notice shall state the purpose of the meeting.

(3) The bylaws may provide the following:

(a) A method of adopting and of amending administrative rules and regulations governing the details of the operation and use of the park property.

(b) Restrictions on, and requirements respecting the use and maintenance of mobile homes located within the park, and the use of the park property, which restrictions and requirements are not inconsistent with the articles of incorporation.

(c) Other provisions not inconsistent with this chapter or with other documents governing the park property or mobile homes located therein.

(4) No amendment may change the proportion or percentage by which members share in the expenses

as initially established unless all the members affected by such change approve the amendment.

723.079 Powers and duties of homeowners' association.

(1) An association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the park property. The association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest, including, but not limited to: the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. Nothing herein limits any statutory or common-law right of any individual home owner or class of home owners to bring any action which may otherwise be available.

(2) The powers and duties of an association include those set forth in this section and ss. 723.075 and 723.077 and those set forth in the articles of incorporation and bylaws and any recorded declarations or

restrictions encumbering the park property, if not inconsistent with this chapter.

(3) An association has the power to make and collect assessments and to lease, maintain, repair, and replace the common areas upon purchase of the mobile home park.

(4) An association shall maintain accounting records in the county where the property is located, according to good accounting practices. The records shall be open to inspection by association members or their authorized representatives at reasonable times, and written summaries of such records shall be supplied at least annually to such members or their authorized representatives. The failure of the association to permit inspection of its accounting records by members or their authorized representatives entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the books and records who, directly or indirectly, knowingly denied access to the books and records for inspection. The records shall include, but shall not be limited to:

(a) A record of all receipts and expenditures.

(b) An account for each member, designating the name and current mailing address of the member, the amount of each assessment, the dates on which and amounts in which the assessments come due, the amount paid upon the account, and the balance due.

(5) An association has the power to purchase lots in the park and

to acquire, hold, lease, mortgage, and convey them.

(6) An association shall use its best efforts to obtain and maintain adequate insurance to protect the association and the park property upon purchase of the mobile home park. A copy of each policy of insurance in effect shall be made available for inspection by owners at reasonable times.

(7) An association has the authority, without the joinder of any home owner, to modify, move, or create any easement for ingress and egress or for the purpose of utilities if the easement constitutes part of or crosses the park property upon purchase of the mobile home park. This subsection does not authorize the association to modify or move any easement created in whole or in part for the use or benefit of anyone other than the members, or crossing the property of anyone other than the members, without his consent or approval as required by law or the instrument creating the easement. Nothing in this subsection affects the rights of ingress or egress of any member of the association.

The procedure established by the Supreme Court of Florida for amending the Florida Rules of Civil Procedure is as follows:

RULE 2.130 PROCEDURE FOR AMENDING RULES

(a) **Emergency Amendments.** The Supreme Court, with or without notice, may change court rules at any time if an emergency exists that does

not permit reference to the appropriate committee of The Florida Bar for recommendations. If a change is made without reference to the committee, the change may become effective immediately or at a future time. In either event, the Court shall fix a date for further consideration of the change. Any person may file comments concerning the change, seeking its abrogation or a delay in the effective date. The Court may allow oral argument in support of such comments by The Florida Bar, by its sections and committees, and by other bar associations.

(b) **Amendments Generally.** The following procedure shall be followed for consideration of rule amendments generally other than those adopted under subdivisions (a), (e), and (f).

(1) Proposals for court rules, amendments to them or abrogation of them may be made by any person.

(2) Proposals shall be submitted to the clerk of the Supreme Court in writing and shall include a general description of the proposed rule change or a specified proposed change in content. The clerk of the Supreme Court shall refer proposals to the appropriate committee under subdivision (b)(3).

(3) The Florida Bar shall appoint the following committees to consider rule proposals: Civil Procedure Rules Committee, Criminal

Procedure Rules Committee, Summary Procedure Rules Committee, Traffic Court Rules Committee, Appellate Procedure Rules Committee, Juvenile Procedure Rules Committee, Rules of Evidence Committee, Judicial Administration Rules Committee, Probate and Guardianship Rules Committee, and Workers' Compensation Rules Committee.

(4) Each committee shall be composed of attorneys and judges with extensive experience and training in the area of practice of the committee calling for regular, frequent use of the rules. The member of the committee shall serve for three years staggered terms. The President of The Florida Bar shall appoint the chairman and vice chairman of each committee.

(5) The Judicial Administration Rules Committee shall also serve as a Rules Coordinating Committee. Each rules committee shall have at least one of its Rules Committee to serve as liaison. All proposed rules changes shall be submitted to the Judicial Administration Rules Committee which shall then refer all proposed rules changes to those rules committees that might be affected by the proposed change. All proposed changes shall be submitted by June 30 of each year of the rules cycle.

(6) The committees shall consider and vote on each proposal. The committees may originate proposals and are charged with the duty

of regular review and reevaluation of the rules to advance orderly and inexpensive procedures in the administration of justice. The committees may accept or reject proposed amendments or may amend proposals. The committees shall keep minutes of their activities, which minutes shall reflect the action taken on each proposal. Copies of the minutes shall be furnished to the clerk of the Supreme Court, to the Board of Governors of The Florida Bar, to the Supreme Court of Florida, and to the proponent of any proposal considered at the meeting.

(c) **Schedule for Rule Proposals.**

(1) Every four years commencing on or before September 1, 1983, each committee shall report all proposed rule changes to the Board of Governors of The Florida Bar with the committee's final numerical voting record on each proposal.

(2) On or before March 1, 1984, and every four years thereafter, the Board of Governors shall consider the proposals and shall vote on each proposal to recommend acceptance, rejection, or amendment.

(3) On or before April 1, 1984, and every four years thereafter, each committee shall file a report of its proposed rule changes with the Supreme Court. Each committee may amend its recommendations to coincide with the recommendations of the Board

of Governors of The Florida Bar or may decline to do so or may amend its recommendations in another manner. Any such amendments shall also be reported to the Supreme Court. The report shall include the final numerical voting record of the proposals in the committee and a report of the action and voting record in the Board of Governors of The Florida Bar.

(4) The Supreme Court shall establish a date during the month of May or June for oral argument on the proposals. Notice of the hearing on the proposals and a copy of the proposals shall be furnished to the affected committee chairman and vice chairman, the Executive Director of The Florida Bar, and any person who has asked in writing filed with the clerk of the Supreme Court for a copy of the notice. The recommendations or a resume of them shall be published in the Florida Bar Journal or Florida Bar News before the hearing. Notice of the hearing shall also be published in the Florida Bar Journal or Florida Bar News. Before the date of oral argument, any person may file comments concerning the proposals with the clerk of the Supreme Court. The Supreme Court may hear oral argument from any person and shall hear oral argument on behalf of The Florida Bar, any bar association, and the affected committee.

(5) Orders of the Supreme Court on said proposals should be adopted in sufficient time to take effect on January 1 of the following year. The Supreme Court may permit Motions for

Rehearing to be filed on behalf of any person, The Florida Bar, any bar association, and the affected committee.

(d) **Rejected Proposals.** If a committee rejects a proposal, the proponent may submit the proposed rule to the Board of Governors and shall notify the chairman and vice chairman of the affected committee of the submission of the proposed rule to the Board of Governors. Minority reports of committees are allowed and may be submitted to both the Board of Governors and the Supreme Court.

(e) **Emergency Recommendation by Committee.** If, in the opinion of a committee, a proposal is of an emergency nature, and the Board of Governors concurs, proposals may be made at any time to the Supreme Court. If the Court agrees that an emergency exists, the Court may set a time for oral argument and consideration of the proposal.

(f) **Request by Court.** the Supreme Court may direct special consideration of a proposal at times other than those specified in this rule and may require a committee to report its recommendation with the recommendations of the Board of Governors of The Florida Bar. The Supreme Court may set oral argument on the report at any time.

(g) **Local Rules Proposed by Trial Courts.** The foregoing procedure shall not apply to local rules proposed by a majority of circuit and

county judges in the circuit. The Chief Justice of the Supreme Court may appoint a Local Rule Advisory Committee to consider and make recommendations to the Court concerning local rules and administrative orders submitted pursuant to Judicial Administration Rule 2.050(e).

Two Rules of the Florida Rules of Appellate Procedure which might be relevant here are Rules 9.130 and (.330 which provide as follows:

RULE 9.130 PROCEEDINGS TO REVIEW NON-FINAL ORDERS

(a) Applicability.

(1) This rule applies to review of the non-final orders authorized herein in the district courts of appeal and the circuit courts. Review of other non-final orders in such courts and non-final administrative action shall be by the method prescribed by Rule 9.100.

(2) Review of non-final orders in criminal cases shall be as prescribed by Rule 9.140.

(3) Review of non-final orders of lower tribunals is limited to those which:

(A) concern venue;
(B) grant, continue, modify, deny or dissolve injunctions, or refuse to modify or dissolve injunctions;
(C) determine:
(i) jurisdiction of the person;

(ii) right to immediate possession of property;

(iii) right to immediate monetary relief or child custody in domestic relations matters;

(iv) the issue of liability in favor of a party seeking affirmative relief; or

(v) whether a party is entitled to arbitration.

(4) Non-final orders entered after final order on motions which suspend rendition are not reviewable; provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in Rule 9.110. Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule.

(5) Orders entered on motions filed pursuant to Fla.R.Civ.P. 1.540 are reviewable by the method prescribed by this rule.

(6) Review authorized by this rule shall be by the court which has jurisdiction to review the final order in the cause.

(b) Commencement. The jurisdiction to seek review of orders described in subsections (a)(3)-(5) shall be invoked by filing two copies of a notice, accompanied by the filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.

(c) Notice. The notice, designated as a notice of appeal of non-

final order, shall be substantially in the form prescribed by Rule 9.900(c).

(d) Record. A record shall not be transmitted to the court unless ordered.

(e) Briefs. Appellant's initial brief, accompanied by an appendix as prescribed by Rule 9.220, shall be served within 15 days of filing the notice. Additional briefs shall be served as prescribed by Rule 9.210.

(f) Stay of Proceedings. In the absence of a stay, during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters, including trial or final hearing; provided that the lower tribunal may not render a final order disposing of the cause pending such review.

(g) Review on Full Appeal. This rule shall not preclude initial review of a non-final order on appeal from the final order in the cause.

RULE 9.330 REHEARING; CLARIFICATION; CERTIFICATION

(a) Time for Filing; Contents; Reply. A motion for rehearing or for clarification of decision, or for certification, may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing or clarification shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not

re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion.

(b) Limitation. A party shall not file more than one motion for rehearing or for clarification of decision and one motion for certification with respect to a particular decision.

(c) Exception; Bond Validation Proceedings. A motion for rehearing or for clarification of a decision in proceedings for the validation of bonds or certificates of indebtedness as provided by Rule 9.030(a)(1)(B)(ii) may be filed within 10 days of an order or within such other time set by the court. A reply may be served within five days of service of the motion. The mandate shall issue forthwith if a timely motion has not been filed. A timely motion shall receive immediate consideration by the court and, if denied, the mandate shall issue forthwith.

(d) Exception; Review Under Rule 9.120. No motion for rehearing or for clarification may be filed in the Supreme Court addressed to the grant or denial of a request for the Court to exercise its discretion to review a decision described in Rule 9.120.

Supreme Court, U.S.
FILED
OCT 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-350

In The

Supreme Court of the United States

October Term, 1989

LANTANA CASCADE OF PALM BEACH, LTD., A FLORIDA LIMITED PARTNERSHIP, BY AND THROUGH JAMES A. SMITH AS ONE OF ITS GENERAL PARTNERS,

Petitioner,

v.

LANCA HOMEOWNERS, INC., A FLORIDA CORPORATION NOT FOR PROFIT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA INCLUDING APPENDIX THERETO

JOANNA R. MARTIN
300 Colorado Avenue
Suite 209
Stuart, FL 34994
(407) 283-6993
Co-Counsel for Respondent

MICHAEL B. SMALL
SMALL, SMALL & SMALL, P.A.
Paramount Center – Penthouse
139 N. County Road
Palm Beach, FL 33480
(407) 833-1100
Counsel of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED (RESTATED)

Question No. 1. Whether the minimum standards for due process of law are violated by a state court rule of civil procedure which permits a mobile homeowners' association to bring class action suits on behalf of all homeowners whose mobile homes are placed on rented lots in a mobile home park, concerning matters of common interest within the park.

Question No. 2. Whether the minimum standards for due process of law are violated by a state court rule of civil procedure promulgated to take effect immediately.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF RESPONDENT CORPORATION

Respondent in this proceeding is Lanca Homeowners, Inc., a Florida not-for-profit corporation (hereinafter "Respondent"), created in accordance with the Florida Mobile Home Act, Section 723.075, Fla. Stat. (1985) as a "mobile homeowners association", requiring written approval for its creation and operation by a minimum of two-thirds (2/3) of all of the four-hundred sixty-one (461) mobile home owners in the mobile home park. Respondent corporation has no subsidiaries or parent companies or affiliates.

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JURISDICTIONAL STATEMENT

This Court has no certiorari jurisdiction over the first Question Presented because the federal issue therein asserted was not properly and timely raised in the state courts. Petitioner made its first reference to the due process clause of the Federal Constitution in its motion for rehearing to the Florida Supreme Court, and can not reasonably claim that the motion for rehearing constituted the first opportunity to raise that issue. In denying Petitioner's motion for rehearing, the Florida Supreme Court did not address the federal issue.

This Court has no certiorari jurisdiction over the second Question Presented because:

(1) The federal issue therein asserted was not raised at all in the state courts, and was no where addressed by the state courts.

(2) The question is an hypothetical one which contains an element which is contrary to actual fact.

Finally, this Court lacks certiorari jurisdiction over both Questions Presented because there exist independent adequate nonfederal grounds for the decision of the Supreme Court of Florida.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article V, Section 2. (a) of the Florida Constitution states:

> SECTION 2. Administration, practice and procedure. –
>
> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the

> administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Article I, Section 9. of the Florida Constitution states:

> Due Process. – No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Chapter 723, Fla. Stat.

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Section 723.073, Fla. Stat.

Section 723.075(1), Fla. Stat.

Section 723.076, Fla. Stat.

Section 723.077, Fla. Stat.

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Section 723.079, Fla. Stat.

Section 723.081, Fla. Stat.

COUNTERSTATEMENT OF THE CASE

Respondent adopts the facts of the case as stated by the Supreme Court of Florida.

Petitioner owns Lantana Cascade Mobile Home Park located in Florida (the park), which offers for rent 461 mobile home lots. L. C. Grievance Committee (L.C.) is a Florida not-for-profit corporation that was organized in 1975 to represent the interests of mobile home owners in the park. Respondent, Lanca Homeowners, Inc., is a Florida not-for-profit corporation that was organized in 1985 as "the homeowners association", pursuant to § 723.075, Fla. Stat. (1985). Three-hundred and forty-four mobile home owners within the park consented in writing to joining Respondent corporation. In 1986, Respondent and L.C. wrote a letter to Petitioner charging it with engaging in unfair practices and threatening to withhold future rental payments. Petitioner filed suit against Respondent and L.C. seeking a declaratory judgment as to whether Respondent or L.C. were authorized to be the representatives of the home owners in the park in matters relating to Chapter 723, Fla. Stat., the "Mobile Home Act". Respondent and L.C., acting as representatives of their membership, filed a class action counterclaim. 541 So.2d at 1122.

After an evidentiary hearing, the trial court issued an order finding that Respondent, although not a member of the subject class, was an appropriate class representative under § 723.079(1), Fla. Stat. (1985), which provided in part:

> The association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest, including, but not limited to: the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action.

The trial court also found that the counterclaim met the requirements of Florida Rule of Civil Procedure 1.220 and was thus maintainable as a class action. Petitioner appealed the trial court's Order to the Fourth District Court of Appeal of the State of Florida. Id. at 1122.

The District Court reversed in part, affirmed in part. It held that although the counterclaim itself was suitable for presentation as a class action, Respondent lacked standing to assert it for two reasons. First, it held that § 723.079(1) is unconstitutional and cannot be used as a basis for finding Respondent a proper class representative. It based this holding on *Avila South Condominium Association v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977), in which the Florida Supreme Court had ruled that the 1975 and 1976 versions of a statute similar to § 723.079(1), Fla.

Stat., governing condominium associations were an unconstitutional legislative incursion into the Florida Supreme Court's exclusive authority to promulgate rules governing procedure.[1] Second, the District Court found that because Respondent was not a member of the class, it failed to meet the requirements of Florida Rule of Civil Procedure 1.220(a), and thus lacked standing to represent the class under the rule. Id. at 1122-23.

Respondent appealed to the Florida Supreme Court the finding that it was an improper class representative, and Petitioner cross-appealed the finding that the counterclaim was maintainable as a class action. Respondent raised three issues on appeal: whether § 723.079(1) is constitutional; whether the statute should be adopted as a rule; and whether Respondent can act as class representative. On cross-appeal, Petitioner raised a single issue: whether the counterclaim itself was maintainable as a class action. Id. at 1123.

Petitioner challenged Respondent's request for adoption of a rule of procedure identical to § 723.079(1), Fla. Stat., primarily on the ground that the Florida Rules of Judicial Administration provide for the promulgation of new, immediately effective, rules only in emergencies, and argued that there had been no evidence of any such emergency. Petitioner's brief at 22.

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[1] In *Avila*, the Florida Supreme Court recognized, however, that the statute had merit and thus adopted a slightly modified version of the text of the 1976 statute as an emergency rule of procedure. Id. at 1122-23.

The Florida Supreme Court, adhering to its rationale in *Avila*, held that § 723.079(1), Fla. Stat., was clearly unconstitutional because that statute, by purporting to define the proper parties to suits litigating substantive rights, addressed matters of procedure which were within the Florida Supreme Court's exclusive domain pursuant to Article V, § 2(a), Florida Constitution. 541 So.2d at 1123.

As to Respondent's request that the Florida Supreme Court adopt the substance of § 723.079(1), Fla. Stat., as a new rule of Florida Civil Procedure, the Florida Supreme Court again followed its reasoning in *Avila*. Just as the Florida Supreme Court had found in *Avila*, that the peculiar features of condominium development, ownership, and operation indicated the wisdom of providing a procedural vehicle for settlement of disputes affecting condominium unit owners concerning matters of common interest; so that Court in the present action similarly noted that the unique features of mobile home park residency called for an effective procedural format for resolving disputes between park owners and home owners concerning matters of shared interest. Thus, just as it had done in *Avila*, the Florida Supreme Court recognized the usefulness of the policy sought to be asserted by the Florida Legislature in enacting § 723.079(1), Fla. Stat., and accordingly adopted the substance of that statute as a new Florida Rule of Civil Procedure, Rule 1.222, to be effective immediately. Id. at 1123-24.

The Florida Supreme Court then answered Respondent's third point on appeal – whether it could act as a class representative – in the affirmative, and stated that under the newly adopted rule, Respondent had the

authority to represent all the home owners in the park in a class action. Id. at 1124.

Petitioner filed a petition for rehearing to the Florida Supreme Court and raised for the first time (Petitioner's brief at 9, 20, 26, App. 25) its claims that:

> Due process of law requires at a minimum that an absent Plaintiff be provided with an opportunity to remove himself from a class action by executing and returning an "opt out" or "request for exclusion" form to the Court. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. [sic] 628 (1985) . . .
>
> The due process clause of the United States Constitution requires that the named Plaintiff in a class action at all times adequately represent the interests of the absent class members. *Phillips Petroleum Co. v. Shutts, supra; Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940) . . .

Petitioner also asserted, for the first time, in its motion for rehearing, that by making the new rule of civil procedure immediately effective, the alleged substantive right of Petitioner to a Judgment in its favor on its initial action for declaratory judgment, together with an award of attorney's fees and costs, had been taken away by the Florida Supreme Court and that Petitioner had thus been denied a substantive right without "due process of law". Petitioner's brief, App. 26.[2]

By Order dated April 25, 1989, the Supreme Court of Florida denied Petitioner's motion for rehearing, without

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[2] Petitioner gave no hint as to whether it was referring to the due process clause of Art. I, § 9, Florida Constitution, and rights thereunder, or to the Federal Constitution.

addressing the "due process" arguments made by Petitioner. Petitioner's brief, App. 17.

REASONS WHY THE PETITION SHOULD BE DENIED

A. JURISDICTIONAL REASONS

1. This Court has no certiorari jurisdiction over the first Question Presented because the federal issue asserted therein was not properly and timely raised in the state court, and the state court did not consider or resolve the federal issue. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 at n. 3 (1983).

In its motion for rehearing to the Supreme Court of Florida, Petitioner suggested for the first time that "due process of law" requires that an absent Plaintiff be provided with "opt out" or "request for exclusion" forms, and that the due process clause of the United States Constitution requires that the named Plaintiff in a class action at all times adequately represent the absent class members. Petitioner's brief, App. 25.

Petitioner admits that the "due process" argument was first raised in its motion for rehearing to the Florida Supreme Court. Petitioner states on page 26 of its brief:

> . . . The issues raised in the motion for rehearing were raised at the very first opportunity at which they could be raised . . .

Respondent strenuously disputes Petitioner's assertion that the motion for rehearing constituted the first opportunity for raising the federal issue. Petitioner's brief states at page 22:

> The rule did not exist before the court's decision of September 22, 1988. However, Respondent had, in the text of its brief to the Supreme Court of Florida requested as alternative relief the promulgation of a rule identical to the statute which had been declared unconstitutional.

Thus, during the brief writing stage of the appeal to the Florida Supreme Court, Petitioner was clearly on notice that Respondent was asking that Court to replace the statute which the District Court had declared unconstitutional with an identical rule of procedure. Furthermore, in view of the Florida Supreme Court's 1977 decision in *Avila*, it was apparent that the Florida Supreme Court was *likely* to replace the unconstitutional statute with a similar or virtually identical, and immediately effective, rule of procedure. Thus, Petitioner should have raised its federal constitutional challenge no later than in its answer brief filed with the Supreme Court of Florida.

Petitioner concedes that it did not raise the federal issue in its answer brief, but instead attacked Respondent's request for promulgation of the new rule on different grounds. Petitioner states on page 22 of its brief:

> This request [for the promulgation of a rule identical to the statute which had been declared unconstitutional] was challenged primarily on the ground that the Florida Rules of Judicial Administration provide for the promulgation of new or modified rules to become effective immediately only in emergencies . . . while there had been no evidence of the existence of any such emergency either at the trial court level or at the Supreme Court of Florida [footnote omitted].

This Court has held that raising a federal issue for the first time in a petition for rehearing addressed to the highest state court is insufficient to confer certiorari jurisdiction on this Court unless the state court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958). The Florida Supreme Court did not entertain Petitioner's motion for rehearing and did not decide the federal issue therein raised.[3]

Petitioner cannot reasonably claim that it was "surprised" by the Florida Supreme Court's granting of Respondent's request for promulgation of the new rule of procedure, so as to justify its failure to raise the federal issue before the Florida Supreme Court rendered its decision. Clear precedent for the Florida Supreme Court's action in the case at bar had been established by that Court in its often cited 1977 decision in *Avila* wherein it, after declaring unconstitutional a Florida statute which purported to confer class action status on condominium associations, replaced that statute with a virtually identical, immediately effective, emergency rule of procedure. Thus, the exception articulated in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67

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[3] The regularly followed practice of the Florida appellate courts is to refuse to consider issues raised for the first time in a motion for rehearing. See, e.g., *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So.2d 958 (Fla. 4th DCA 1983), pet. rev. dism. 451 So.2d 848 (Fla. 1984); *Sag Harbour Marine, Inc., V. Fickett*, 484 So.2d 1250 (Fla. lst DCA 1985), rev. den. 494 So.2d 1150 (Fla. 1986).

(1932), does not apply to excuse Petitioner's tardy raising of the federal issue.

2. This Court has no certiorari jurisdiction over the second Question Presented because Petitioner did not at any time raise in the state courts the federal issue now asserted and the state courts never addressed or resolved the federal issue. *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

In its motion for rehearing to the Florida Supreme Court, Petitioner did assert that by making the new rule of civil procedure immediately effective, the alleged substantive right of Petitioner for entry of a judgment in its favor on its declaratory judgment action, together with an award of attorney's fees and costs, had been taken away without "due process" of law. Petitioner's brief, App. 26. However, Petitioner did not disclose whether it was referring to the "due process" clause of the Florida Constitution, Art. I, Section 9, or to the federal Constitution. This Court has held that if a state Constitution has a "due process" clause, a claim, making no reference to the federal Constitution, that "due process" has been violated will be deemed to relate to the state Constitution and not the federal Constitution. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914).

3. This Court also has no certiorari jurisdiction over the second Question Presented because the second Question is an hypothetical question seeking an advisory opinion.

In Question No. 2, Petitioner asks whether the due process rights of a party to a lawsuit are violated when,

in the course of an appeal in that lawsuit, a new, immediately effective rule of civil procedure is promulgated, and where, as a result of the rule's taking immediate effect, the party is deprived of an alleged right to collect attorney's fees and costs

> "for having prevailed in an action based upon the rules as they had previously existed . . . "

Neither the orders or decisions of the state courts below nor the record raise the question presented in Question No. 2.

Petitioner most certainly did *not* "prevail" on either the declaratory judgment action which it filed or on the counterclaim asserted against it by Respondent and by L.C. Petitioner's brief, at App. 62-66, contains an excerpt from Petitioner's initial complaint which shows that Petitioner's action was one seeking a declaratory judgment as to whether Respondent or L.C. were authorized to be the representatives of the home owners within the park in matters relating to Chapter 723, Fla. Stat.

Petitioner's brief also contains at App. 56-61 excerpts from Respondent's and L.C.'s countercomplaint wherein they assert their right to bring suit in their representative capacity as representatives of their membership and of the class of mobile home owners in the park.

After an evidentiary hearing, the trial court entered its order certifying Respondent as an appropriate class representative to maintain the counterclaim. Petitioner's brief, App. 12-15. Although no final judgment was entered by the trial court, the trial court thus implicitly answered against Petitioner the question posed by it in its complaint for declaratory judgment; and it was that order

of the trial court certifying Respondent as class representative which Petitioner appealed to the District Court.

It simply can not be correctly asserted that Petitioner "prevailed" in the action. Since the gist of Question No. 2 is whether Petitioner's due process rights were violated by a new rule of procedure which divested Petitioner, as "prevailing party", of its alleged right to collect attorney's fees and costs; the question is an hypothetical one which contains an element totally contrary to actual fact. Thus, if this Court were to answer Question No. 2, this Court would be rendering an impermissible advisory opinion.

4. Finally, this Court has no jurisdiction to review the decision of the Supreme Court of Florida because that decision rests on independent and adequate state grounds.

That the decision rests on such state grounds is clear from a fair reading of the decision itself. The decision declares that a Florida Statute violated Art. V, § 2(a) of the Florida Constitution, because the statute impinged upon the Florida Supreme Court's exclusive domain in matters of procedure. However, because the Florida Supreme Court recognized the usefulness of the policy sought to be asserted by the Florida legislature in enacting the statute, the Supreme Court, pursuant to a Florida Rule of Judicial Administration, adopted a new emergency Rule of Florida Civil Procedure, which is virtually identical to the unconstitutional statute. In its decision the Supreme Court adhered to its own earlier 1977 decision in *Avila* wherein it had also declared violative of the Florida Constitution a similar Florida Statute, which also

had purported to affect procedural matters in the context of class actions by condominium associations, but adopted the rejected statute as an emergency rule of procedure. Each and every one of the constitutional sections, rules, statutes and cases cited in the Florida Supreme Court's decision are from Florida's Constitution, Florida's Rules, Florida's Statutes, and Florida's Courts. These provisions of Florida law on which the Supreme Court of Florida's decision is based are eminently sufficient to support its decision.

B. THE DECISION BELOW IS CORRECT

5. The decision below is not in conflict with decisions of this Court.

Petitioner argues in its brief (p. 24-25) that the decision below conflicts with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Hansberry v. Lee*, 311 U.S. 32 (1940).

Respondent disputes Petitioner's allegations of conflict. *Phillips Petroleum* involved a group of individual royalty owners who filed suit against an oil company in a Kansas court and who sought certification of the suit as a class action on behalf of all affected royalty owners who resided in every state and several foreign countries and who possessed rights to oil leases in several states. In reviewing *Phillips Petroleum*, this Court held that due process required that an absent plaintiff be provided with an opportunity to remove himself from the class and further that the named plaintiff at all times represent the interests of the absent class members. 472 U.S. at 812.

The facts of mobile home park living in Florida are totally different from the facts in *Phillips Petroleum*. The peculiar features of mobile home park living, and the unique relationship between mobile home owners and park owners, require that a procedural vehicle be established for settlement of disputes affecting matters of common interest.

The Florida Legislature, by its enactment of Chapter 723, Fla. Stat., and the Florida Supreme Court in its landmark decision in *Stewart v. Green*, 300 So.2d 889 (Fla. 1974), acknowledged that a "hybrid" type of property relationship exists between mobile home owners and park owners and that the relationship is not simply one of landlord and tenant. This unique relationship, in large part, stems from the grossly unequal bargaining position of a mobile home owner once he "cements" his home into a mobile home park. Once a home is placed in a park it has a permanence of location. Its wheels and hitch are removed, it is placed on a concrete base, tied down in accordance with law, and joined with utility connections. Generally, once a home is located in a park, permanent attachments are added such as a garage, porch, shed or additional rooms. These permanent structures often are lost if the home is moved. In addition, it is both expensive and difficult to move a home. This situation is further aggravated by the existence of "closed parks" which refuse to allow older homes into their park and require the prospective tenant to purchase a new home or exact a high entrance fee for the privilege of bringing the older home into the park. The reality, therefore, is that it is not economically feasible for mobile home owners to move

their homes since if they are forced to do so, they will lose virtually their entire investment.

It is clear that once a mobile home is "cemented" in place, the home owner is at the mercy of the park owner. Under these adverse conditions, and in recognition of the home owners' unequal position, the Florida Legislature has sought to protect mobile home owners in such areas as: restriction of grounds for eviction (§ 723.061, Fla. Stat.); protection of a home owner's right to sell his home in the park (§ 723.058, Fla. Stat.); protection from undisclosed assessments and costs (§ 723.041(1)(b), Fla. Stat.); protection from unconscionable rents (§ 723.033, Fla. Stat.); and protection from lot rental increases, reduction in services and changes in rules and regulations (§ 723.037(1), Fla. Stat.). Despite these protections, the abuses by park owners and the oppressive treatment of home owners continues. The only recourse for the economically enslaved home owner faced with abuses by the park owner is to move his home out of the park, attempt to sell it, or challenge the park owner's actions in a lawsuit.

Even if the elderly mobile home owners who live on limited incomes could afford to relocate, there is no place to go because of the shortage of lots in other parks or because other parks are "closed parks" which refuse to admit used mobile homes. Similarly, the option of selling their homes is not feasible because they stand to lose all or a substantial amount of the investment in their homes. This is so because the most frequent abuse by park owners is in charging unreasonable and unconscionable rent and it has been established in Florida that as the rents increase in a mobile home park, the value of the

individual mobile home decreases. See e.g., *Offner v. Keller Park Investors,* 19 Fla. Supp. 2d 140 (Fla. 6th Cir. Ct. Pasco Co. 1986). Thus, the only viable alternative for the home owner is to challenge the actions of the park owner in a lawsuit. The most difficult question presented is how can the individual home owner afford the expenses and costs of litigating his claims against the park owner.

Rule 1.222 promulgated by the Florida Supreme Court provides the procedural vehicle for the individual home owner to economically resolve his disputes with the park owner and in addition, saves a multiplicity of suits, reduces the expense of litigation and makes the legal process more effective and expeditious. As Mr. Justice Douglas opined in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 186 (1974):

> The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

That philosophy is at the very heart of the case at bar.

The Florida Legislature, in enacting § 723.079, Fla. Stat., declared mobile home owners to be a class insofar as their common interests are concerned and provided the homeowners' association with the capacity to sue on behalf of the class. The cooperative nature of mobile home park living, to-wit; each home owner rents his lot from the park owner, is governed by the park owner's rules and regulations, and suffers or enjoys the quality of the park owner's maintenance of the common areas. The homes in the park are in close proximity, and the home

owners have the use of common roads, a clubhouse, recreational facilities and laundry facilities. This shows that the home owners' interests are coextensive with regard to the common elements of the park. Thus, in response to unlawful or improper actions of the park owner concerning these common interests, the home owners' goals in obtaining relief are identical. The wisdom of establishing the right of an incorporated homeowners association, as a matter of law, to represent the class of home owners concerning matters of common interest is clear. The public policies and considerations which led the Florida Supreme Court to adopt the emergency rule of civil procedure for condominium associations in *Avila*, are even more compelling when considering the peculiar features of mobile home park living and the unequal bargaining position that exists between home owners and park owners.

Thus, it is clear that the elements required to establish the efficacy of a "class" under Florida Rule of Civil Procedure 1.220 are *inherent* in a mobile homeowners' association making pleading and proof of such elements unnecessary and unduly burdensome. Further, the Florida Legislature, in Chapter 723, Fla. Stat., has validly created the capacity of a mobile homeowners' association to maintain suits and otherwise represent the class of home owners concerning matters of common interest. See e.g.: § 723.037(1), Fla. Stat.; § 723.037(3), Fla. Stat.; § 723.054, Fla. Stat.; § 723.055, Fla. Stat.; § 723.071, Fla. Stat.; § 723.073, Fla. Stat.; § 723.075(1), Fla. Stat.; § 723.076, Fla. Stat.; § 723.077, Fla. Stat.; § 723.078, Fla. Stat.; § 723.079, Fla. Stat.; § 723.081, Fla. Stat.

The intent of the Florida Legislature in the "Mobile Home Act" is clearly and precisely stated in § 723.075(1), Fla. Stat., to-wit: "[U]pon incorporation and service of the notice described in s. 723.076, the association *shall become the representative of the mobile home owners in all matters relating to this chapter.*" (emphasis supplied).

The facts in *Phillips Petroleum* are therefore significantly different from the facts of mobile home park residency.

The decision of the Florida Supreme Court does not conflict with *Hansberry*. *Hansberry* stands for the proposition that the Fourteenth Amendment to the federal Constitution does not compel state courts or legislatures to adopt any particular rules thought by this Court to be appropriate for class actions. Recognizing that divergent local institutions and interests should be regarded, this Court stated, at 311 U.S. 42:

> . . . there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interest of absent parties who are to be bound by it . . .

The decision of the Florida Supreme Court clearly satisfies the standard set forth in *Hansberry*.

6. Respondent is qualified to represent the home owners in the park.

Petitioner argues in its brief (p. 27) that Respondent corporation was not properly formed and that Respondent is thus not qualified to represent the home owners.

That issue was not preserved for review by this Court. While the record would show that Petitioner

raised this issue in its brief to the State District Court of Appeal, the decision of that Court is silent on the issue. Likewise, the decision of the Florida Supreme Court is silent on the issue.[4]

7. The decision below affects only mobile home parks in Florida.

Petitioner argues in its brief (p. 28-30) that it is in the national interest for this Court to discuss the constitutional parameters of class action litigation by associations for residential communities, and asserts that in doing so, this Court should require application of the formalities set forth in *Phillips Petroleum*, and appears to suggest that this Court should limit the remedies obtainable by homeowners' associations to injunctive, declaratory, or other prospective relief.

Although the issue is not contained in or inferable from the Questions Presented, Petitioner objects on page 29 of its brief to the Florida Supreme Court's holding that unconscionable rent actions on behalf of mobile home owners within an individual park, against the owner of that park, may be brought in a class action format. This issue has been extensively litigated in the Florida courts. (See 541 So.2d at 1124 and cases cited therein.) The Florida Supreme Court in the case at bar resolved the issue,

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[4] Most of the alleged "facts" on which Petitioner relies in support of its argument on this point are from Petitioner's attorney's arguments before the trial court (Petitioner's brief, at 27, App. 40-42).

and its articulate decision demonstrates a complete understanding of the facts of mobile home park living in Florida and of the concept of unconscionability as applied to mobile home park living in Florida.

Although Petitioner argues that the Florida Supreme Court's decision disregards the conditions for bringing class actions by associations as enunciated by this Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977) and *Warth v. Seldin*, 422 U.S. 490, 511 (1975), there is no conflict. *Hunt* and *Warth* state that an association has standing to bring suit on behalf of its members when: its members would have the right to sue in their own right; the interest it seeks to protect are germane to the organization's purpose; and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

The facts of mobile home park living in Florida, as outlined under part 5 of this brief and in the Florida Supreme Court's decision in *Stewart v. Green*, together with the provisions of Chapter 723, Fla. Stat., show that mobile homeowners' associations in Florida clearly meet the "standing test" enunciated by this Court in *Hunt* and *Warth*.

8. No party has a vested substantive right to prevail in litigation.

Petitioner argues in its brief (p. 31-33) that the Florida Supreme Court's promulgation of Rule 1.222 violated Petitioner's due process rights because it deprived Petitioner of its asserted vested "right" to have the counterclaim filed by Respondent against Petitioner dismissed,

and the asserted subsumed right to obtain an award of attorney's fees and costs.

It is well established in Florida, as elsewhere, that statutes which do not alter contractual or vested rights but relate only to remedies or procedure are not within the general rule against retrospective operation and, absent a saving clause, all pending proceedings are affected. See, e.g.: *Rothermel v. Florida Parole and Probation Commission,* 441 So.2d 663 (Fla. lst DCA 1983); *Fogg v. Southeast Bank,* 473 So.2d 1352 (Fla. 4th DCA 1985); *McCord v. Smith,* 43 So.2d 704 (Fla. 1949), and authorities cited therein. Likewise, statutes withdrawing jurisdiction are immediately applicable, even as to pending suits, unless expressly reserved, even though such application may terminate pending litigation. *Griffith v. Florida Parole and Probation Commission,* 485 So.2d 818, 820 (Fla. 1986). The same principles apply to court rules.

The Florida Supreme Court declared § 723.079(1), Fla. Stat., unconstitutional because the Court asserted that the statute was procedural, and thus was within that Court's exclusive domain of promulgating rules of procedure. 541 So.2d at 1123. The Florida Supreme Court then replaced the statute with an identical, or virtually identical, rule of procedure. 541 So.2d at 1123-24. If the Florida Supreme Court was correct in its ruling that § 723.079(1), Fla. Stat., was procedural, then under the cases and authorities referred to in the preceding paragraph, the new rule – affecting matters of procedure – was properly made effective to the pending action. On the other hand, if § 723.079(1), Fla. Stat., were not procedural, then the Florida Legislature did not impinge upon the exclusive domain of the Florida Supreme Court, and the Florida

Supreme Court would have erroneously declared the statute unconstitutional. In either event, what the Florida Supreme Court did was to ratify, confirm, validate or cure the substance of what it asserted was a defective existing statute, and thus took away nothing from Petitioner.

Petitioner argues that making Rule 1.222 immediately effective deprived Petitioner of a substantive right, to-wit: the "right" to prevail on the litigation filed in trial court. However, there is no substantive or vested right to prevail in a lawsuit. This is clear, not only because of the inherent uncertainties of litigation, but also from the many cases which approve the application of new statutes addressing remedies, procedure, jurisdiction, or which eliminate penalties, to pending litigation even when the effect of such application is to alter the outcome of the litigation. *Tel Service Co. v. General Capital Corp.*, 227 So.2d 667 (Fla. 1969). This Court has also approved the application of new remedial, curative, or enabling statutes to pending litigation even though the end result of such application was to materially alter the outcome of the litigation. *McNair v. Knott*, 302 U.S. 369, 372-74 (1937). Thus, there can be no vested right to win a lawsuit.

Finally, even if the Florida Supreme Court had not made Rule 1.222 immediately effective, and even if the trial court had dismissed Respondent's counterpetition for lack of standing, Respondent could have reinstituted the same action in the same court. *Denver And Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967). Thus, Petitioner was deprived of nothing by the Florida Supreme Court's decision.

CONCLUSION

For the reasons stated, this Court should decline to issue a Writ of Certiorari to review the Judgment of the Florida Supreme Court.

Respectfully submitted,

MICHAEL B. SMALL, ESQ.
SMALL, SMALL & SMALL, P.A.
Paramount Center-Penthouse
139 N. County Road
Palm Beach, FL 33480
(407) 833-1100
Telecopier: (407) 835-0547
Counsel for Respondent

Michael B. Small, Esq.
Fla. Bar No. 074842

No. 89-350

In The

Supreme Court of the United States

October Term, 1989

LANTANA CASCADE OF PALM BEACH, LTD., A FLORIDA LIMITED PARTNERSHIP, BY AND THROUGH JAMES A. SMITH AS ONE OF ITS GENERAL PARTNERS,

Petitioner,

v.

LANCA HOMEOWNERS, INC., A FLORIDA CORPORATION NOT FOR PROFIT,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

THE SUPREME COURT OF THE UNITED STATES

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PERTINENT PROVISIONS FROM CHAPTER 723, FLORIDA STATUTES (1987), THE FLORIDA MOBILE HOME ACT

723.033 Unconscionable lot rental agreements. –

(1) If the court, as a matter of law, finds a mobile home lot rental agreement, or any provision of the rental agreement, to have been unconscionable at the time it was made, the court may:

(a) Refuse to enforce the rental agreement.

(b) Enforce the remainder of the rental agreement without the unconscionable provision.

(c) Limit the application of the unconscionable provision so as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its meaning and purpose, the relationship of the parties, and other relevant factors to aid the court in making the determination.

723.037 Lot rental increases; reduction in services or utilities; change in rules and regulations; mediation or arbitration. –

(1) A park owner shall give written notice to each affected mobile home owner and the board of directors of the homeowners' association, if one has been formed, at least 90 days prior to any increase in lot rental amount or reduction in services or utilities provided by the

park owner or change in rules and regulations . . . The homeowners' association shall have no standing to challenge the increase in lot rental amount, reduction in services or utilities, or change of rules and regulations unless a majority of the affected home owners agree, in writing, to such representation.

* * *

(3) A committee, not to exceed five in number, designated by a majority of the affected mobile home owners or by the board of directors of the homeowners' association, if applicable, shall meet at a mutually convenient time with the park owner within 30 days of the notice to discuss the reasons for the increase in lot rental amount, reduction in services or utilities, or change in rules and regulations.

* * *

723.041 Entrance fees; refunds; exit fees prohibited. –

(l)(a) Entrance fees on new mobile home placements shall be specifically set forth in the prospectus or offering circular. Any such fee shall be clearly identified in writing at the time that the rental agreement is signed or otherwise concluded.

(b) The failure on the part of a mobile home park owner or developer to disclose fully all fees, charges, or assessments shall prevent the park owner or operator from collecting such fees, charges, or assessments; and a refusal by the mobile home owner to pay any undisclosed charge shall not be used by the park owner or developer as a cause for eviction in any court of law.

* * *

723.054 Right of mobile home owners to peaceably assemble; right to communicate. –

(1) No provision contained in any bylaw, rental agreement, regulation, or rule pertaining to a mobile home park shall infringe upon the right of the mobile home owners to peaceably assemble in an open public meeting for any lawful purpose, at reasonable times and in a reasonable manner, in the common areas or recreational areas of the mobile home park.

(2) No provision contained in any bylaw, rental agreement, regulation, or rule pertaining to a mobile home park shall infringe upon the right of the mobile home owners or tenants to communicate or assemble among themselves, at reasonable times and in a reasonable manner, for the purpose of discussing any problems relative to the mobile home park. Such discussions may be held in the common areas or recreational areas of the park, including halls or centers, or in any resident's mobile home. In addition, the park owner or developer may not unreasonably restrict the use of any facility, including the use of utilities, when requested.

(3) No provision contained in any bylaw, rental agreement, regulation, or rule pertaining to a mobile home park shall prohibit any mobile home owner from canvassing mobile home owners for the purposes described in this subsection. For the purposes of this subsection, the term "canvassing" includes an oral or written request; the distribution, circulation, posting, or publication of a notice; or a general announcement requesting the payment of membership dues or other matters relevant to the membership of the park association, federation, or organization. Such canvassing shall be done at a reasonable time or times and in a reasonable manner. It is the intent of the Legislature,

through the enactment of this subsection, to prohibit any owner, developer, or manager of a mobile home park from prohibiting free communication among mobile home owners or tenants in the guise of regulations or rules restricting or limiting canvassing for association, federation, or organization dues or other association, federation, or organization matters.

723.055 Right of mobile home owner to invite public officers, candidates for public office, or representatives of a tenant organization. - No provision contained in any bylaw, rental agreement, regulation, or rule pertaining to a mobile home park shall infringe upon the right of a mobile home owner to invite public officers, candidates who have qualified for public office, or officers or representatives of a tenant organization to appear and speak upon matters of public interest in the common areas or recreational areas of the mobile home park at reasonable times and in a reasonable manner in an open public meeting. The mobile home park owner, however, may enforce rules and regulations relating to the time, place, and scheduling of such speakers, which rules and regulations will protect the interests of the majority of the home owners.

723.058 Restrictions on disposal of mobile homes.

(1) No mobile home park owner shall make or enforce any rule, regulation, or rental agreement provision which denies or abridges the right of any mobile home owner to sell his mobile home within the park; which prohibits the mobile home owner from placing a "for sale" sign on or in his mobile home (except that the size, placement, and character of all signs

are subject to properly promulgated and reasonable rules and regulations of the mobile home park); or which requires the mobile home owner to remove the mobile home from the park solely on the basis of the sale thereof.

(2) The park owner shall not exact a commission or fee with respect to the price realized by the seller unless the park owner has acted as agent for the mobile home owner in the sale pursuant to a written contract.

723.061 Eviction; grounds, proceedings.–

(1) A mobile home park owner may evict a mobile home owner or a mobile home only on one or more of the grounds provided in this section.

(a) Nonpayment of lot rental amount . . .

(b) Conviction of a violation of a federal or state law or local ordinance, which violation may be deemed detrimental to the health, safety, or welfare of other residents of the mobile home park.

(c) Violation of a park rule or regulation, the rental agreement, or this chapter . . .

(d) Change in the use of the land comprising the mobile home park, or the portion thereof from which mobile homes are to be evicted, from mobile home lot rentals to some other use . . .

(e) Failure of the purchaser of a mobile home situated in the mobile home park to be qualified as, and to obtain approval to become, a tenant, if such approval is required by a properly promulgated rule.

* * *

723.071 Sale of mobile home parks. –

(l)(a) If a mobile home park owner offers a mobile home park for sale, he shall notify the officers of the homeowners' association created pursuant to ss. 723.075-723.079 of his offer, stating the price and the terms and conditions of sale.

(b) The mobile home owners, by and through the association defined in s. 723.075, shall have the right to purchase the park, provided the home owners meet the price and terms and conditions of the mobile home park owner by executing a contract with the park owner within 45 days, unless agreed to otherwise, from the date of mailing of the notice and provided they have complied with ss. 723.075-723.079. If a contract between the park owner and the association is not executed within such 45-day period, then, unless the park owner thereafter elects to offer the park at a price lower than the price specified in his notice to the officers of the homeowners' association, he has no further obligations under this subsection, and his only obligation shall be as set forth in subsection (2).

* * *

723.073 Conveyance by the association. –

(1) In the event that an association acquires a mobile home park and intends to reconvey a portion of portions of the property acquired to members of the association, the association shall record copies of its articles and bylaws and any additional covenants, restrictions, or declarations of servitude affecting the property with the clerk of the circuit court prior to the conveyance of any portion of the property to an individual member of the association.

* * *

723.075 Homeowners' associations. –

(1) In order to exercise the rights provided in s. 723.071, the mobile home owners shall form an association in compliance with this section and ss. 723.077, 723.078, and 723.079, which shall be a corporation for profit or not for profit and of which not less than two-thirds of all of the mobile home owners within the park shall have consented, in writing, to become members or shareholders. Upon such consent by two-thirds of the mobile home owners, all consenting mobile home owners in the park and their successors shall become members of the association and shall be bound by the provisions of the articles of incorporation, the bylaws of the association, and such restrictions as may be properly promulgated pursuant thereto. The association shall have no member or shareholder who is not a bona fide owner of a mobile home located in the park. *Upon incorporation and service of the notice described in s. 723.076, the association shall become the representative of the mobile home owners in all matters relating to this chapter.* [emphasis added]

* * *

723.076 Incorporation; notification of park owner.

(1) Upon receipt of its certificate of incorporation, the homeowners' association shall notify the park owner in writing of such incorporation and shall advise the park owner of the names and addresses of the officers of the homeowners' association by personal delivery upon the park owner's representative as designated in the prospectus or by certified mail, return receipt requested.

(2) The homeowners' association shall file a notice of its right to purchase the mobile home park as set forth in s. 723.071. The notice shall contain the name of the association, the name of the park owner, and the address or legal description of the park. The notice shall be recorded with the clerk of the circuit court in the county where the mobile home park is located. Within 10 days of the recording, the homeowners' association shall provide a copy of the recorded notice to the park owner at the address provided by the park owner by certified mail, return receipt requested.

723.077 Articles of incorporation. – The articles of incorporation of a homeowners' association shall provide:

(1) That the association has the power to negotiate for, acquire, and operate the mobile home park on behalf of the mobile home owners.

(2) For the conversion of the mobile home park once acquired to a condominium, a cooperative form of ownership, or another type of ownership. Upon acquisition of the property, the association shall be the entity that creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business or, if the homeowners choose a different form of ownership, the entity that owns the record interest in the property and that is responsible for the operation of property.

723.078 Bylaws of homeowners' associations. – In order for a homeowners' association to exercise the rights provided in s. 723.071, the bylaws of the association shall provide for the following:

(1) The directors of the association and the operation shall be governed by the bylaws.

(2) The bylaws shall provide and, if they do not, shall be deemed to include, the following provisions . . .

* * *

723.081 Notice of application for change in zoning. – The mobile home park owner shall notify in writing each mobile home owner or, if a homeowners' association has been established, the directors of the association, of any application for a change in zoning of the park within 5 days after the filing for such zoning change with the zoning authority.

19 FLORIDA SUPPLEMENT SECOND

OFFNER, et al. v KELLER PARK INVESTORS, I, LTD.

Case No. CA84-3636
Sixth Judicial Circuit, Pasco County
August 20, 1986

APPEARANCES OF COUNSEL

John T. Allen, Jr. and Christopher P. Jayson, Law Office of John T. Allen, Jr.,P.A., for plaintiffs.
V. James Dickson for defendants.

OPINION OF THE COURT

LOWELL W. BRAY, JR., Circuit Judge.

THIS MATTER coming on to be heard on July 28, 29 and 31, 1986, on the complaint of various mobile home owner residents of Senate Manor mobile home park against Keller Park Investors, I, Ltd., the owner-operator of the park, said complaint seeking relief under Florida Statutes 723.004(4) and 723.033 and the court having sat as the trier of fact, having heard the testimony, reviewed the exhibits, and having considered the arguments of counsel, the Court finds as follows:

FINDINGS OF FACT:

1. On June 30, 1983, Keller Investment Properties, Inc., arranged for the purchase of Senate Manor Mobile Home Park, a 100% occupied park of approximately 395 units for the sum of $4,125,000.00.

2. The $1,000,000.00 down payment for the purchase of the property was raised by the syndication of a note in the amount of $1,375,000.00.

3. From the money raised in this initial syndication, $103,000.00 (2 ½% of the purchase price) was paid to Keller Investment Properties, Inc. as a "finder's fee".

4. Title to the property was taken in the name of Keller Park Investors, I, Ltd., in a limited partnership.

5. The sole owner of Keller Investment Properties, Inc. and the general partner of Keller Park Investors I, Ltd. is Brian R. Keller.

6. The partnership entered into a contract with Keller Investment Properties, Inc. to pay 5% of the gross receipts from the park to Keller Investment Properties, Inc. as a management fee.

7. The primary, if not sole, consideration for the 5% management fee was the presence, in the park, of two (husband and wife) part-time managers.

8. Through various financing arrangements, the park was mortgaged for 113% of its purchase price.

9. Because of the financing scheme, the interest expenses on the mobile home park in 1985 (a representative year) came to $124.79 per lot, per month.

10. The primary objective in purchasing the park was to sell the depreciation deductions from it as a tax shelter.

11. Because the finder's fee and the depreciation were based on the purchase price (the larger the price, the larger the benefits), there was no incentive to bargain to buy the park at the best (lowest) price possible.

12. During the period from July 1, 1983, until August, 1986, the partnership has received over

$1,000,000.00 in cash and tax benefits, over $1,000,000.00 in interest on financing has been paid, and the management company has received almost $200,000.00 in finder's fees and management fees.

13. At the present time, the partnership has a negative cash investment of $675,000.00 in the park.

14. At the time Senate Manor was purchased, the rents were $101.00 for an interior lot, $107.00 for a corner lot, and $112.00 for a lakefront lot.

15. As of January 1, 1984, the rents were raised to the following:

$133.00 for an interior lot

$139.00 for a corner lot

$144.00 for a lakefront lot.

16. On December 19, 1984, the plaintiffs herein filed his [sic] suit.

17. As of January 1, 1985, the rents were raised to the following:

$145.00 for an interior lot

$151.00 for a corner lot

$156.00 for a lakefront lot.

18. As of January 1, 1986, the rents were raised to the following:

$159.00 for an interior lot

$165.00 for a corner lot

$170.00 for a lakefront lot.

19. On May 8, 1985, this Court entered its order directing that the $32.00 increase for 1985 due on May 1 and each month thereafter be paid into the Registry of the Court, or into a specially created escrow account. The funds have been put into a special fund held at interest in the name of counsel for both parties.

20. The cash operating expenses for the mobile home park rose 10.42% in 1983, 18.82% in 1984, and fell 2.09% in 1985. The total amount of increase in cash operating expenses from 1983 to 1985 amounted to $6.44 per lot per month.

21. The rental increases were precipitated not by the market or by operating expenses, but by a combination of extraordinary interest expenses and a desire for larger profits.

22. During the ownership by the partnership, minimal improvements were made and services suffered at least some diminution in quality.

23. The mobile home owners have $8,500.00 invested in their mobile homes (most of which are double wide) and appurtenances including cement work, screen and aluminum rooms, storage sheds, etc.

24. There are few, if any, available parks to which the mobile home owners could move their homes, since most parks in the area are closed to mobile homes not purchased from the park owner and since most of the parks are filled.

25. The cost of moving and resetting the mobile homes and appurtenances would be approximately

$10,000.00 and the home would be of less value after the move.

26. Mobile homes in the park are currently selling at $4,000.00 to $15,000.00 less than their fair market value because of the current level of rents in the park.

27. The residents of the mobile home park are all adults and are almost all retired people living on retirement benefits, pensions, or social security.

28. A reasonable rental charge for the interior lots in each of the three years, based upon rents charged in comparable parks, would be $101.00 in 1984, $116.00 in 1985, and $125.00 in 1986. In each year, an additional charge of $6.00 for each corner lot and $11.00 for each lakefront lot would also be reasonable.

29. Increases based on the Consumer Price Index gains for the previous year would give a January 1, 1984 increase of 3.8%, a January 1, 1985 increase of 4%, and a January 1, 1986 increase of 3.8%.

30. During the trial the Court struck certain testimony of Defendant's witness Dale Hayes under authority of Walters v. State Road Department, 230 So.2d 878 (Fla. 1st DCA 1970). The Court's findings would still be the same even if such testimony were considered and weighed by the court as the trier of fact.

APPLICATION OF LAW TO FACTS:

A. The facts set out above establish procedural unconscionability because of the absence of any meaningful choice on the part of the mobile home owners, together with terms and benefits unreasonably favorable to the

partnership and the management company. Kohl v. Bay Colony Club Condominium, 398 So.2d 865 (Fla. 4th DCA 1981), pet. for review denied 408 So.2d 1094 (Fla. 1981), Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d DCA 1982). The mobile home owners find themselves bound by a bargain they never made. They have no voice in the matter of rents. The mobile homes, if not the owners themselves, are captives of the partnership and the management company. The owners have three choices: 1) pay the rent no matter how high it is set, 2) sell their mobile homes at less than their actual value, or 3) move the mobile homes at possibly a greater loss than from a sale. Through an established pattern of self-dealing which the management company is following the value of the mobile home owner's assets is being siphoned off and confiscated by the partnership and the management company.

B. The facts set out above establish substantive unconscionability because of the outrageous degree of unfairness, Kohl, supra, Steinhardt, supra.

(a) The increases are not based on a legitimate financial basis for calculating rental values, but are arbitrary and capricious in that they are driven by the consequences of the defendant's financing scheme. Moreover, the increases are confiscatory in nature reducing the value of the mobile home owners property Fredricks v. Hofmann, 45 Fla. Supp. 44, (Circuit Court, Sarasota County, Fla. 1976). Appel v. Scott, 479 So.2d 800 (Fla. 2d DCA 1985).

(b) The increased rental is significantly higher than the fair market rental value of the lots (3.17% in 1984, 25%

in 1985 and 27.2% in 1986). State v. DeAnza, 416 So.2d 1173 (Fla. 5th DCA 1982), Appel, supra.

(c) The rent grossly exceeds that paid for lots of equal value in comparable parks. (see Plaintiff's Exhibit No. 44 in evidence.) DeAnza, supra, Appel, supra, Ashling Enterprises v. Browning, 487 So.2d 56 (Fla. 3d DCA 1986), Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985).

IT IS THEREFORE, ORDERED AND ADJUDGED:

I. The Court enters judgment for the Plaintiffs and against Defendant because of the rental increases of 1984, 1985, and 1986 were unconscionable.

II. To avoid any unconscionable result, the Court sets the rents for each of the years in question as follows:

	Interior Lot	Corner Lot	Lakefront Lot
1984	$101.00	$107.00	$112.00
1985	$116.00	$122.00	$127.00
1986	$125.00	$131.00	$136.00

III. The Defendant is enjoined from levying, charging, or collecting any rents in excess of these rates from January 1, 1984 through December 31, 1986, and is ordered to refund to Plaintiffs such rents as have been collected in excess of these rental charges.

IV. Counsel for both parties are directed to pay over to the defendant from the specially created fund, any such sums as it may be entitled to under this Order and

to remit the balance of the monies which are held under the Court's Order of May 8, 1985, to the Plaintiffs.

V. Should any Plaintiff be entitled to a credit in excess of the amount being held in the specially created fund, he shall be entitled to deduct from each of his twenty-four payments an amount equal to 1/24th of the credit balance to which he is entitled after the Clerk's refund to him. Should any Plaintiff cease to be a tenant before the expiration of the twenty-four months he may, at his option, assign the right to reduce payments to his successor tenant or receive a money judgment against the Defendant for any unreclaimed excess rent to which he is entitled. The Court retains jurisdiction to enter such judgments as may be necessary or proper under this judgment.

VI. The Plaintiff is entitled to recover a reasonable attorney's fee and costs in this action, and the court retains jurisdiction to determine the amount of such fees and costs.

VII. Any and all other prayers for relief are denied.

DONE AND ORDERED in Chambers, at New Port Richey, Pasco County, Florida, this 20th day of August, 1986.